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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

UNITED STATES OF AMERICA, PETITIONER

v.

KENNETH MOSES LOUD HAWK, ET AL., RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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87-A-

QUESTIONS PRESENTED

1. Whether the Sixth Amendment's Speedy Trial Clause protects a defendant who is an appellee in an on-going pre-trial appeal filed by the Government as part of its effort to try, convict and incarcerate him or her.

2. Whether a per se rule should be adopted allowing pre-trial criminal appeals to consume a limitless amount of time, thereby insuring that even clearly inappropriate appellate delay cannot impact a defendant's right to a speedy trial.

3. Whether every time a suppression order is entered against the Government with respect to only one part of a criminal case, the Government can contumaciously refuse to proceed to trial on the uneffected counts after being denied a stay by both the trial and appellate benches, and suffer no consequence under Barker v. Wingo for such recalcitrance.

4. Whether the appellate court erred in upholding the the District Court's use of discretion in sustaining a speedy trial violation by applying the analysis of Barker v. Wingo to the unique facts of this decade old case.

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KENNETH MOSES LOUD HAWK, ET AL., RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

Respondent Dennis James Banks, on his own behalf as well as on the behalf of Respondents Kenneth Moses Loud Hawk, KaMook Banks and Russ James Redner, respectfully moves that this Court deny the petition for writ of certiorari, seeking review of the Ninth Circuit's opinion in this case.

OPINION BELOW

The opinion below is reported at 741 F.2d 1184.

JURISDICTION

Petitioner invokes the jurisdiction of this Court pursuant to 28 U.S.C. 1254(1). The judgement of the Court of Appeals was issued on August 30, 1984, and a petition for rehearing was denied on January 8, 1985. (The mandate issued January 16, 1985.)

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial * * *.

STATEMENT

This criminal case began on November 14, 1975. Despite continuous proceedings over the last ten years, it has yet to go to trial.

On November 13, 1975 the FBI issued a teletype describing two vehicles in which it believed federal fugitives were traveling. The next day a motor home matching the description was stopped in the eastern Oregon town of Ontario by Oregon State Trooper Griffiths. It contained Respondent KaMook Banks, former co-defendants Anna Mae Aquash and Leonard Peltier[1], and at least one other unknown person.

The Trooper approached the motor home, and asked all the occupants to step outside. Respondent KaMook Banks, her infant child, and Peltier and Aquash emerged. In answer to his inquiry, Griffiths was told that no one was inside. At that same instant the vehicle sped forward, and Peltier escaped over a fence. The vehicle was found a half mile down the highway with no one inside.

A subsequent search pursuant to state and federal search warrants revealed blasting caps, pocket watches, and eight firearms which allegedly had their serial number obliterated.

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[1]Leonard Peltier's case was severed from Respondents', and subsequently dismissed on motion of Petitioner.

Anna Mae Aquash died under mysterious and still unresolved circumstances in South Dakota. The FBI interceded when her body was found, and an autopsy was conducted at its direction (during which her hands were severed and sent to Washington). The cause of death was given as "exposure," and she was quickly buried under unusual procedures. The testimony of hospital staff revealed that thawing blood had been seen dripping from a clear hole in her head. An independant pathologist performed an autopsy on the exhumed body, and found that she had been executed at close range. (CR 132)

All items were secreted in various parts of the vehicle.[2,3]

As Trooper Griffiths stopped the motor home, a station wagon containing Respondents Kenneth Moses Loud Hawk and Russ James Redner pulled off the highway and stopped on the shoulder a distance back from the motor home. They too were arrested. A search of their vehicle pursuant to the same warrants produced a quantity of a substance which the Government contends was dynamite, and which was subsequently destroyed by state officials despite the fact that it could easily have been stored in nearby magazines. The destruction was carried out with the knowledge of, and in the presence of, federal agents. Although they could have easily preserved the evidence, they chose not to do so.[4,5]

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[2]See: CR-R-160. (Note: Between the time of the Government's first appeal and the first remand the District Court adopted a new numbering system. In effect, the numbering of documents was begun anew, with an "R" preceeding the document number. However, some documents from the mid 1970s are near unfindable because of the confusion, and are more easily referenced by using the old system that gave each page a separate number. These documents will be referred to by the notation "FCR" for "former" clerk's record.)

[3]Petitioner's theory is that Dennis Banks was the driver of the motor home. It bases this conclusion on the fact that his wife was in the motor home, as was his briefcase, and that a few fingerprints alleged to be his were found on such items as pickle jars. The Government does not allege that his fingerprints were found on any of the items charged in the indictment, or on any other items that would indicate a "recent" presence in the motor home.

In fact, Petitioner did not provide Respondents with crucial reports that showed that other peoples' fingerprints were found in the motor home, or other reports that evidenced police "throw downs" in which people other than Dennis Banks were identified as travelling in the motor home in November, 1975 along I-80N (now I-84). (These reports were received from other defense counsel on other unrelated cases and forwarded to Respondents). See: CR-R-160, RT 6/17/80 pps. 115-116, CR-R-242, CR-R-216, RT 3/9/83 pps. 30, 48-49.

[4] Petitioner alleges that "Oregon state law enforcement officers removed the dynamite and destroyed it without consulting federal officials." Pet. for Cert at 4. The FBI agent present at the execution of the state search warrant for the vehicles instructed a state officer to stop his search of the motor home and start searching the station wagon. (RT 5/9/78 pps. 211-212). The officer followed this order and thereupon found the substance alleged to be dynamite. It was not until the next afternoon (during which time at least a dozen FBI agents were in the area) that the evidence was removed. (RT 3/22/76 p. 9, RT 5/9/78 pps. 167-168) FBI agents were present during the removal of the alleged dynamite and its

All respondents were indicted on November 25, 1975 and charged with possessing explosives and firearms. Trial was set for the week of February 9, 1976 (CR 6).

A superceding indictment was returned on December 22, 1975. Two days later Respondents filed their motion to suppress based on the destruction of the alleged dynamite, as well as on the destruction of the cardboard boxes and plastic bags that the destroyed evidence was contained in. No fingerprint analysis had been conducted. (CR 17)

On January 21, 1976 the trial date was continued for one month on motion of Respondents Redner and Loud Hawk to March 8, 1976. The paramount reason for the continuance was problems with defense investigation.[6]

On January 23, 1976 defendants Dennis Banks' case was severed from that of the other Respondents. However, three days later he was arrested in California. Given this change of circumstances, all parties, including the Government, felt that

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[4](continued) transportation to a gravel pit for destruction. The agents photographed the process and were present at the destruction. (RT 3/22/76, p. 50). Surviving wrappers from the alleged dynamite were handed to FBI agents on the scene. (RT 3/22/76 p. 51). Prior to the destruction the FBI agent in charge of all Bureau activities in Oregon arrived in the area. He was aware of the existence of the dynamite, and that it was potential evidence in a federal prosecution. He was also aware that an attorney named Beverly Axelrod was present in Ontario, Oregon, representing Respondents, and made no effort to contact her about the destruction. (RT 5/9/78 pps. 166, 167, 169, 172.)

Based on these facts Judge Belloni found that the evidence was "on a conveyer belt to be destroyed. And one word by a member of the FBI would have stopped that conveyer belt." (RT 5/9/78 p. 122)

[5]The only surviving evidence were wrappers which contained not even a trace of explosive material, and photographs. The pictures depicted two proported detonations of sticks of the alleged dynamite connected to state police supplied primer cord and blasting caps. Analysis of the photographs showed that the detonation was inconsistent with that of dynamite, and consistent with that of primer cord and blasting cap alone. RT 3/19/76, RT 5/9-10/78, CR-R-26. App. 37a-40a.

[6]The basis of the investigative difficulties (which have not been cured to this date) became clear at a hearing in March, 1976: The United States Attorney's Office had instructed all "its" witnesses to refrain from talking with anyone associated with the defense. (RT 3/22/76, pps. 78, 83-90)

one joint trial with Mr. Banks would be preferable, even if the March 8 trial date was unrealistic. (RT 2/5/76, pps. 42-48). On February 18, 1976, the trial date was reset to May 12, 1976 in order that all defendants could be tried together. (CR-62) The Government did not object to a joint trial on that date, but rather objected because it was misinformed and did not believe that Mr. Banks would waive removal and be available for trial in May.[7] (FCR 994, 1004)

Despite opposition from the Government, Respondents KaMook Banks, Redner and Loud Hawk were finally released from custody.[8] Within a matter of days of their release, all Respondents were designated "high risk" pursuant to 18 USC §3164 and Section 12(b) of the local plan for Prompt Disposition of Criminal Cases (CR 63). The Government has never moved the Court to rescind that prejudicial appellation.

An evidentiary hearing on Respondents' suppression motion was held on March 19 and 22, 1976. Judge Belloni granted the motion on March 31, 1976, and suppressed "all evidence, tangible and intangible, relating to" alleged dynamite. (App. 157a)

The Government filed a notice of appeal from the suppression order on April 19, 1976 and asked the District Court for a continuance of the trial date, which was denied. (CR 115, CR 120). The Government made a similar request to the Ninth Circuit Court of Appeals on April 23, 1976. Respondents filed an opposition to that request, demanding observance of

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[7]Problems caused by the Government's blockade of defense investigation were also given as a reason for the continuance. (CR 64)

[8]KaMook Banks was released on a stringent third-party recognizance on February 5, 1976, shortly after she had given birth in custody (to Iron-Door-Woman).

Russ Redner and Kenneth Loud Hawk were released with similar restrictions on February 9, 1976.

Redner and Loud Hawk had moved for release as early an November 20, 1975 (CR 3); KaMook Banks did likewise on December 22, 1975 (CR 11). These three respondents made repeated demands for pre-trial release and for contact visits. (CR 3, CR 8, CR 9, CR 10, CR 11, CR 20, FCR 364, CR 45, RT 11/20/75, RT 12/23/75, RT 1/23/76, RT 2/2/76, RT 2/5/76). After their release they had to make repeated demands to the Court for permission to travel. (CR 65, CR 66, CR 67, CR 89, CR 90, CR 119, CR 123, RT 3/3/76, RT 4/29/75)

their right to a speedy trial. (FCR 1086, Respondents' App. 1a-8a). The request for stay was denied.

At an April 29, 1976 hearing, the Government stated that it "could not proceed without [the suppressed evidence]," despite the fact that the suppressed evidence had nothing to do with the gun counts. (RT 4/29/76, p.5) Respondents again insisted on their desire to proceed to trial on May 12. (RT 4/29/76, p. 12, CR 127)

On May 4, 1976 the Government again asked the District Court for a continuance. In that request the Government conceded that Respondents "desire the case to be tried at the earliest practicable opportunity." (CR 136)

On May 11, 1976 the Government filed a response to a Brady[9] motion in which it admitted that it was willing to suffer a dismissal with prejudice for refusing to proceed to trial.[10]

On May 12, 1976 the case was called for trial. All Respondents were ready:

> MR. ROBERTS:
>
> Our defendants' rights under the Speedy Trial Act as well as the Constitution of the United States are being flagrantly violated by the dilatory tactics of the Government in this case.
>
> We are ready for trial. We demand our trial; we demand our day in court now. We want our total and full exoneration by a jury. This is the day set by the Court many months ago for trial. We are ready and need our trial today.

(RT 5/12/76, p.4)

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[9] Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed 2d 215 (1963)

[10] "It hardly makes sense that defendants can be heard to complain under Brady about being in possession of materials which they may consider exculpatory [fingerprint analysis of the vehicles showing prints of people other than Respondents] made available by the United States Government [to attorneys in another case, who provided the material to counsel for Respondents] some twenty-two (22) days before the present trial date and what in light of the upcoming dismissal could prove to be a matter of months before a trial of this case, if indeed there is a trial of this case at all." (CR 140) [emphasis added]

The Government refused to proceed. Judge Belloni dismissed the case with prejudice, saying:

> I am ready to try the case commencing today. Both parties have had ample time to prepare. The defendants are ready to go to trial. For some reason, which I do not understand, the Government is not, even though two of the counts are not even concerned with the subject of previously suppressed evidence. I do not want to dismiss this case without a trial. The factual and legal dispute should be heard and decided, but there is no way the Court can force the Government to call its witnesses. My only recourse is to dismiss the case against these four defendants.
>
> Clearly, there has been unnecessary delay in bringing these four defendants to trial. Clearly, it's the fault of the Government.

During that hearing the Government expressed its desire that the Court impose release restrictions on Respondents. (RT 5/12/76, pps. 6-8. 9-10)

Additionally, the Government admitted that it did not need the suppressed evidence to go forward with the trial on the unrelated counts. (RT 5/12/76, pps. 12-16). The Government filed its notice of appeal from the dismissal in open court. (CR 142; RT 5/12/76, p. 12; App. 122a-123a, fn.2) The appeals were consolidated and "expedited" under Court rules. (App. 123a)

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The consolidated appeals were argued and submitted on October 15, 1976. (App. 123a). A divided panel affirmed on July 26, 1977. (id. at 88a-118a) The Government's petition for rehearing en banc, filed on September 7, 1977, was granted on October 17, 1977. (id. at 123a) On March 6, 1978 the Court of Appeals (without giving up jurisdiction of the case) remanded to the District Court in order that an evidentiary hearing be held. Judge Belloni held that hearing on May 9 and 10, 1978. On June 16, 1978, the government's motion for an extension of time until July 14, 1978 for filing its proposed findings of fact was granted. (id. at 123a) The Findings of Fact were issued on August 23, 1978.

The en banc court issued its opinion on August 7, 1979 (id. at 36a-87a), reversing the suppression order and reinstating the dynamite counts.[11] The Court found that the Government's refusal to proceed to trial on the non-dynamite counts constituted unnecessary delay. However, although it found dismissal was entirely proper, it reversed the "with prejudice" aspect. Although the Government knew it was going to suffer a dismissal, the Court held that forewarning of the dismissal sanction must come from the Court to the Government, rather than the other way around. (id., at 61a)

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[11]Two stinging dissents accompanied the dismissal. Judge Hufstedler wrote that "all appellate inquiry should end with 'affirmed'. . . That result is unsatisfactory to the majority, and therefore, it is required to exolain why the fact of prejudice is nevertheless not prejudice justifying suppression." (id., at 75a-76a)

Judge Ely wrote: "Not only does the majority disregard the critical determinations of the district judge, but also it holds that the judge was clearly wrong in making a determination based upon conflicting testimony. In sum, the majority now does no more in affirming the convictions (sic) that (sic) it might have done upon the record before us in the original en banc proceedings. In fact it does less, for it accords absolutely no weight or deference to the careful review of the district judge upon remand and the guidance with which the district judge has now favored us, and which, in the first en banc disposition, the majority wrote that it wanted. I do not asperse the good faith or the motives of any of my colleagues. All of them know that I hold each in the highest esteem. Notwithstanding, I record my belief that the proceedings in this appeal, with two hearings before the full court, and all the deliberations that followed, reflect a futile exercise. (Id., 86a-87a)

Respondents' Petition for rehearing with suggestion for rehearing en banc was denied October 1, 1979; their Petition for Certiorari was likewise denied March 3, 1980. The Mandate was received in the District Court on March 20, 1980. (CR-R-30)

Following remand, the Government argued that the non-dynamite counts should be reinstated; Respondents argued that they should remain dismissed. (RT 4/14/80, pps. 5-7, 21-22). On May 12, 1980 Judge Redden ruled that if the Government wished to proceed with those counts, a new indictment would be necessary. (RT 5/12/80, p.7)

Although the Government had indicated that it was satisfied with the December 1975 indictment, it brought forth a new indictment with increased charges. Since some of the charges were new, and exposed Respondents to greater risk of incarceration, motions to dismiss for vindictive prosecution were filed. (CR-R-97)

After hearing arguments on the vindictive prosecution claim,[12] Judge Redden issued an (amended) Order on August 12, 1980 denying the motion as toward Respondents Dennis Banks, Russ Redner and Kenneth Loud Hawk. However, the Order granted a dismissal with prejudice for Respondent KaMook Banks. (CR-R-120, CR-R-122)

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[12]Arguments on other motions were also heard in the District Court after remand. One motion and hearing produced evidence that Respondents had been victims of Government invasion into their private lives in a manner which the Government had previously denied. See: RT 6/23/80 pps. 153-183; CR-R-75, CR-R-76, CR-R-85.

Another motion was for disclosure of electronic surveillance, filed by Respondents in 1975 and renewed in 1980. However, it was not until March 10, 1983 that the Government responded to that motion. On that date United States Attorney Charles Turner admitted that his office "had been dilatory. [The motion] had been pending for seven years." (RT 3/10/83, p. 3)

Dennis Banks filed a notice of appeal from the denial of the vindictive prosecution claim on August 15, 1980.[13] Russ Redner did likewise on August 21, 1980, as did Kenneth Loud Hawk on August 22, 1980. The Government did not file its notice until September 2, 1980. (CR-R-125, R-130, R-133, R-139)

Respondents Dennis Banks, Redner and Loud Hawk filed their opening brief on October 15, 1980, and the Government filed its brief on November 3, 1980. The case was argued and submitted on January 7, 1981.

On July 29, 1982 the Court of Appeals reversed the dismissal of the indictment as to KaMook Banks and also dismissed the appeal of the other Respondents under the authority of United States v. Hollywood Motor Car Co., 458 U.S. 263, 102 S. Ct. 3081, 73 L.Ed.2d 754 (1982). Respondents' Petitions for rehearing and for certiorari were denied on October 5, 1982 and January 10, 1983 respectfully (459 U.S. 1117).[14] The Mandate of the Court of Appeals issued on January 31, 1983. (App. 5a)

Trial was set to begin on April 11, 1983, but was reset to May 3, 1983 at the request of the Government. Two additional continuances were made on the Court's motion. Respondents objected to each continuance. (App. 125a)

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[13]Respondents Dennis Banks, Redner and Loud Hawk took their appeal on the authority and reasoning of United States v. Burt, 619 F.2d 831 (9th Cir., 1980) and United States v. Griffin, 617 F.2d 1342 (9th Cir., 1980). They were taken in good faith and not for reasons of delay. (App. 14a, 1125a)
Again the appeals were consolidated and "expedited." (CR-R-144, CR-R-145, CR-R-146, CR-R-149)

[14]Respondent KaMook Banks filed her Petition for Certiorari based on the claim that facts underlying her vindictive prosecution claim not only distinguished her case from United States v. Goodwin, 102 S. Ct. 2485 (1982), but provided strong support for a claim of vindictive prosecution based on the reasoning of that case.

The remaining Respondents filed their Petition alleging that severance of the cases would allow KaMook Banks to create the law of this case before this Court while they could not participate. The result would have been not only a deprivation of their appellate rights, but also a needless waste of judicial, governmental and defense resources. This claim was based on the holding of Cohen v. Beneficial Industrial Corp., 337 U.S. 541, 69 S. Ct. 1221, 93 L. Ed. 1528 (1949), and the line of this Court's cases criticizing piecemeal disposition of cases on appeal.

On May 20, 1983 the District Court again dismissed the indictment, finding that Respondent's rights to a Speedy Trial under the Sixth Amendment and to Due Process were violated by the delay. The Government filed its notice of appeal on June 17, 1983. Again, the appeal was "expedited." (CR-R-271)

The Government filed its opening brief, after requesting an extension, on August 16, 1983. Respondents submitted their brief on September 1 1983.[15] Argument was heard on January 4, 1984, and the Court of Appeals affirmed on August 30, 1984. (App. 1a-25a)

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[15]The Government petitioned both the District Court and the Ninth Circuit to allow it to keep its subpoenas alive during the pendancy of this appeal. Both Courts denied the request. (CR-R-278, CR-R-281, CR-R-289)

The Court of Appeals applied the four-prong balancing test of Barker v. Wingo, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972) (length of delay, reason for delay, assertion of right and prejudice) to the unique facts of this case, and upheld the decision of the District Court that Respondents had been denied their right to a speedy trial.[16] The Court gave effect to the holding of United States v. MacDonald, 456 U.S. 1, 102 S.Ct. 1497, 71 L.Ed.2d 696 (1982) by concluding that a person is "accused" when the Government appeals an Order dismissing a case over its objection.[17] The Court noted that Respondents were subject to imposition of restraints at any time during the pendency of the appeal, and were still suffering under the interference caused by the continuing public accusation embodied in the Government's vigorous and continuous efforts to reinstate the charges against them. (App. 8a)

In discussing the first pre-trial appeal the Court distinguished the gun counts from the dynamite counts. The delay attendant to the former was considered "wholly unnecessary" given the Government's irresponsible refusal to proceed to trial, and was accordingly balanced heavily against

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[15]The Government petitioned both the District Court and the Ninth Circuit to allow it to keep its subpoenas alive during the pendancy of this appeal. Both Courts denied the request. (CR-R-278, CR-R-281, CR-R-289)

[16]The District Court had also dismissed the case because the delay had also violated Respondent's due process rights. The Appellate Court's opinion did not even address this secondary basis of dismissal.

[17]In MacDonald the charges were dismissed on the motion of the Government, rather than over its objection. MacDonald was no longer a party to any legal proceeding designed to bring him to trial on any charges, and was no longer "the subject of public accusation." MacDonald 456 U.S. at 9.

the Government. (Id., at 12a) The Court found that the Government's appeal of dynamite counts was reasonable and would justify a reasonable delay, but that a forty-six month delay on a pre-trial appeal was not reasonable. (Id. at 12a-13a) Therefore, this delay was also put on the Government's side of the scale, but allocated less weight.

As for the second appeal, the Court did not weigh the delay against the Government nor Respondents, as it did not consider the twenty-three months consumed in this "expedited" appeal "undue delay." However, it "wholly excused" the "additional delay of six months that occurred as a result of the defendants seeking certiorari from the judgment of this court."[18, 19] (App. 15a)

Both the majority and Judge Wallace in dissent found that Respondents had "adequately asserted their rights to a speedy trial," having objected to delay as early as May 12, 1976, and having continued to do so after each remand. (App. 15a, 24a)

The Court agreed with the District Court's finding of prejudice to the defense (particular witnesses who had died or had completely lost their memories) and to the defendants (anxiety from unresolved criminal charges over seven-and-a-half years) from this "inordinate delay." However the Court did not entertain a detailed analysis of the prejudice in this case, as it concluded that prejudice need not be shown in order to successfully assert a violation of speedy trial rights. Thus, this factor was not weighed heavily in the balance. (App. 16a-17a)

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[18]It should be noted that the District Court considered the delay on the second appeal (which it calculated as twenty-nine months) to have been unduly long, as it was an "expedited" appeal that followed on the heels of a four-year appellate delay.

[19]The Court's calculation of six months delay attendant to the process of seeking certiorari is curious. The petitions were filed in early December, 1982 and were denied on January 10, 1983. Respondents' petitions for reconsideration were not denied until October 5, 1982.

The Court found all four factors on the side of Respondents, and therefore upheld the District Court's dismissal. (Id., at 17a-18a)

The Government filed a Petition for Reconsideration, which was denied on Janu y 8, 1985. With no Motion to Stay Mandate having been filed, the Mandate issued on January 16, 1985. Thereafter the Government filed an untimely Motion to Stay Mandate followed by a Motion to Recall Mandate. These motions were denied by the Court of Appeals on February 28, 1985 (Respondents' App. 9a-20a). The Government filed its Petition for a Writ of Certiorari on February 26, 1985.

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REASONS WHY THE WRIT SHOULD BE DENIED

Since the Government willingly let the mandate of the Circuit Court issue, this case is now moot. The Court of Appeals upheld a pre-trial dismissal of the indictment with prejudice, and the issuance of the mandate put that Order into effect.

Even if this were still a live case, the issues it presents are not important enough to warrant review. No cases have been halted in the appellate courts awaiting this Court's review of Loud Hawk. In fact, the decisions of the District and Circuit courts have been cited only twice in the last twenty-two months, and not for any proposition associated with the Questions Presented to this Court. Out of one hundred thirty four reported federal cases involving federal defendants' claims of denial of a speedy trial (since the date of the District Court dismissal in this case) only seven cases raised plausable claims grounded in purely constitutional issues (87% raised the Speedy Trial Act). The instant case is the only one of the one hundred fifty raising Sixth Amendment issues of appellate delay.

The Questions Petitioner asks this Court to consider are grounded in meritless argument. The analysis presented by the Government requires a drastic departure from the careful balancing approach of Barker v. Wingo. Rather than allow a balancing of factors, Petitioner seeks to substitute a test which it could never lose. This test would afford Sixth Amendment protection only to those defendants who having successfully defended against Government efforts to reinstate indictments do not need it.

Furthermore, the decision below reflects a correct application of United States v. MacDonald, 456 U.S. 1, 102 S.Ct. 1497, 71 L.Ed.2d 696 (1982). Since the Government has never equivocated from its accusation of crime, nor sought dismissal of any charges, and has attempted (and could always have renewed its attempt) to have bail restrictions imposed on

defendants during an appeal, Respondents were continuously "formally accused." The appeal was b t a part of the Government's unhalting effort to try, convict, and incarcerate them. There are no cases in conflict with the holding of the Court of Appeals.

Likewise, there are no cases in conflict with the decision below that a per se rule should not be adopted allowing pre-trial criminal appeals to consume limitless amounts of time. This rule that the Government seeks would exclude even clearly inappropriate appellate delay from scrutiny under the Sixth Amendment.

The Court of Appeals was equally correct in rejecting the Government's desire to escape responsibility under the Sixth Amendment for the delay it willfully created. To have sustained the Government's argument would have been to hold that whenever a suppression order is entered against the Government with respect to only one part of a criminal case, it can contumaciously refuse to proceed to trial on the unaffected counts after being denied a stay by both the trial and appellate benches, and suffer no consequence under Barker v. Wingo for such recalcitrance.

Given the outrageous length of pre-trial delay in this 1975 case, the fact of the Government's refusal to proceed to trial in violation of Orders of two courts, the strong assertion of speedy trial rights by defendants, and the personal and defense-related prejudice suffered, the Circuit Court was correct in finding all four Barker factors weighing in Respondent's favor. There is no error below for this Court to correct.

Should this Court nonetheless desire to consider an issue of pre-trial appellate delay and the Sixth Amendment, the Loud Hawk case is an inappropriate selection. This is a mutant speedy trial case with a muddy record. It would provide poor material from which to weave any principle. Bizzare cases make incomprehensible law.

Finally, review should not be granted because the District Court found an independant basis for dismissal (a due process violation) which was neither addressed by the appellate court nor by the Questions Presented by the Government's Petition for Certiorari. It would be absurd for this Court to do as the Government asks (Petition for Certiorari at 27-28 fn. 21) and take upon itself the task of reviewing a purely factual question on a voluminous record without the aid of any prior appellate review.

I. This case is now moot.

The Court of Appeals denied the Government's Petition for Reconsideration on January 8, 1985. As no timely motion to stay mandate was filed, the mandate issued on January 16, 1985.

It is clear that the issuance of a mandate does not deprive this Court of jurisdiction. Aetna Casulty and Surety Co. v. Flowers, 304 U.S. 464, 67 S.Ct. 798, 91 L.Ed. 1024 (1947); Carr v. Zaja, 283 U.S. 52, 51 S.Ct. 360, 75 L.Ed. 836 (1931); Louisville & Nashville Railroad Company v. Behlmer, 169 U.S. 644, 18 S.Ct. 502, 42 L.Ed. 889 (1898); The Conqueror, 166 U.S. 110, 17 S.Ct. 510, 41 L.Ed. 937 (1896). However, when the mandate in this case issued, it put into the effect Judge Redden's Order dismissing the case with prejudice. No indictment is now pending, and no new indictment can be issued even if this Court reversed the judgement of the Court of Appeals.

In United States v. Villamonte-Marquez, __U.S.__, 103 S.Ct. 2573, 77 L.Ed.2d 22 (1983) this Court rejected a mootness argument in a criminal case. The Court of Appeals had reversed convictions in that case, finding a Fourth Amendment violation. After the mandate of that Court issued, the Government dismissed the underlying indictment pursuant to FRCrP 48(a). A month thereafter the United States filed its petition for certiorari. 77 L.Ed.2d at 34-35.

In finding no mootness problem the Court stated:

> The Government has sought review of the Court of Appeals' decision reversing respondent's convictions. Ordinarily our reversal of that decision would reinstate the judgment of conviction and the sentence entered by the District Court. . . The fact that the Government did not obtain a stay, thus permitting the issuance of the mandate of the Court of Appeals, would not change the effect of our reversal. . . Under our reasoning in Mancusi v. Stubbs [citation omitted], the absence of an indictment does not require a contrary conclusion. Further, it is settled law that the preliminary steps in a criminal proceeding are "merged" into a sentence once the defendant is convicted and sentenced. . . Upon respondents' conviction and sentence, the indictment that was returned against them was merged into their convictions and sentences, thus obviating any need for a separate reinstatement of the

> original indictment. . . [A] successful effort on the part of the Government to reverse the judgment of the Court of Appeals would have the effect of reinstating the judgment of conviction.

Villamonte-Marquez, 77 L.Ed.2d at 26, fn.2.

Since Respondents have never been convicted, there is no judgement for the dismissed indictment in this case to merge into.

Furthermore, unlike both Villamonte-Marquez, supra, and Mancusi v. Stubbs, 408 U.S. 204, 92 S.Ct. 2308, 33 L.Ed.2d 293 (1972), there is nothing further that the District Court could do even if this Court reversed the Judgement of the Court of Appeals.

In Mancusi, supra, the mandate of the appellate court (ordering that a prior Tennessee conviction was unconstitutional and could not be used for enhancement purposes at sentencing) had issued and, pursuant to that order, Stubbs had been resentenced. He received the same sentence as before, however, because still another conviction from Texas was used as a predicate.

This Court held that

> Until it can be said with certainty that the New York courts may validly resentence respondent to the same term as they imposed prior to the decision of the Court of Appeals now under review here, petitioner continues to have an interest in the availability of the Tennessee conviction as a support for second-offender sentencing of respondent.

Mancusi, 408 U.S. at 206. It based its reasoning on two cases, both of which stand for the proposition that obedience to a judgement which has taken effect does not necessarily give up the ability to have that judgement reversed.

In Bakery Drivers v. Wagshal, 333 U.S. 437, 68 S.Ct. 630, 92 L.Ed. 792 (1948) a union had appealed from an injunction issued by the District Court. The Court of Appeals dismissed, and thereafter the union lifted its boycott. The case was not moot, however, as the union was merely obeying the injunction while attempting to have it reviewed and reversed.

Likewise, in Dakota County v. Glidden, 113 U.S. 222, 5 S.Ct. 428, 28 L.Ed.981 (1885), this Court rejected another mootness argument:

> There can be no question that a debtor against whom a judgment for money is recovered may pay that judgment and bring a writ of error to reverse it, and if reversed can recover back his money. And a defendant in an action of ejectment may bring a writ of error, and failing to give a supersedeas bond, may submit to the judgment by giving possession of the land, which he can recover if he reversed the judgment by means of a writ of restitution. In both these cases the defendant has merely submitted to perform the judgment of the court, and has not thereby lost his right to seek a reversal of that judgment by writ of error or appeal.

113 U.S. at 222.

Thus, money given up after the issuance of a mandate can be recovered if the judgement is reversed. Likewise, land given up can be gotten back.

In criminal cases the Government can have one leg upholding a sentence declared valid as long as there is a possibility that another leg which is presently accomplishing the same task may be withdrawn. Indeed, the Government can decide that it does not want to further prosecute a case without giving up on having a formerly secured judgement of conviction reinstated.

However, where the Government has willingly let a dismissal with prejudice take effect on a ten-year-old case, knowing that there is no prior judgement that can be reinstated if the appellate judgement is reversed, there is no case to be continued. When an appellate mandate upholding a dismissal with prejudice issues, it can only mean that the Order of the District Court has finally been put into effect, and that the appellate process is terminated. Calmitsch v. Ricsley, 705 F.2d 351 (9th qir., 1983) For the first time in the decade long life of this case, a dismissal finally means that the case is over, thus rendering the petition for certiorari moot.

2. The issues presented are not important enough to warrant review.

The questions that this case provide are ones that are limited to interesting, but nonetheless rather academic and infrequent queries under the Speedy Trial Clause of the Sixth Amendment. The Government asserts that the issue of pre-trial appellate delay is important enough to merit the attention of this Court. The facts do not bear out the Government's contention.

Since the date of Judge Redden's dismissal on Speedy Trial Clause grounds (May 20, 1983) there have been one-hundred thirty four (134)[20] reported federal decisions involving demands by federal defendants for dismissal due to alleged denial of a speedy trial. Ninty-four (94) of those cases relied on statutory Speedy Trial grounds alone.[21]

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[20]These statistics contain cases reported as of March 8, 1985. The cases are not listed in the table of authorities, as they are included for statistical rather than precedential reasons.

[21]The Speedy Trial Act is 18 U.S.C. Section 3161 et seq. The cases are: UNITED STATES v. ANDERTON, 752 F.2d 1005 (5th Cir., 1985); UNITED STATES v. BROWN, ___ F.2d ___, (No. 83-5330), (9th Cir., 1985); UNITED STATES v. DORMAN, 752 F.2d 595 (11th Cir., 1985); UNITED STATES v. GOLOMB, ___ F.2d ___, (No. 590, Docket 84-1248), (2nd Cir., 1985); UNITED STATES v. KROESSER, 750 F.2d 833 (11th Cir., 1985); UNITED STATES v. LATHAM, ___ F.2d ___, (No. 83-2686), (7th Cir., 1985); UNITED STATES v. RODRIGUEZ-FRANCO, 749 F.2d 1555 (11th Cir., 1985); UNITED STATES v. TIBBOEL, ___ F.2d ___, (No. 84-1072), (7th Cir., 1985); UNITED STATES v. VIGIL-MONTANEL, ___ F.2d ___, (No. 84-5159), (11th Cir., 1985); UNITED STATES v. ADAMO, 742 F.2d 927 (6th Cir., 1984); UNITED STATES v. BECK, 729 F.2d 1329 (11th Cir., 1984); UNITED STATES v. BLACK, 733 F.2d 349 (4th Cir., 1984); UNITED STATES v. BOURNE, 743 F.2d 1026 (4th Cir., 1984); UNITED STATES v. BROWN, 736 F.2d 807, (1st Cir., 1984); UNITED STATES v. BRYANT, 726 F.2d 510, (9th Cir., 1984); UNITED STATES v. CAREY, 746 F.2d 228 (4th Cir., 1984); UNITED STATES v. DARBY, 744 F.2d 1508 (11th Cir., 1984); UNITED STATES v. DENNIS, 737 F.2d 617 (7th Cir., 1984); UNITED STATES v. DiPASQUALE, 740 F.2d 1282 (3rd Cir., 1984); UNITED STATES v. FERRIS, 751 F.2d 436 (1st Cir., 1984); UNITED STATES v. FREY, 735 F.2d 350 (9th Cir., 1984); UNITED STATES v. GONSALVES, 735 F.2d 638 (1st Cir., 1984); UNITED STATES v. GONZALEZ, 748 F.2d 74 (2nd Cir., 1984); UNITED STATES v. HARRIS, 724 F.2d 1452 (9th Cir., 1984); UNITED STATES v. HELDT, 745 F.2d 1275 (9th Cir., 1984); UNITED STATES v. HENDERSON, 746 F.2d 619 (9th Cir., 1984); UNITED STATES v. HINES, 728 F.2d 421 (10th Cir., 1984); UNITED STATES v. JOHNPOLL, 739 F.2d 702 (2nd Cir., 1984); UNITED STATES v. MARTIN, 742 F.2d 512 (9th Cir., 1984); UNITED STATES v. MARTINEZ, 749 F.2d 601 (10th Cir., 1984); UNITED STATES v. MARTINEZ, 749 F.2d 623 (11th Cir., 1984); UNITED STATES v. MASSA, 740 F.2d 629 (8th Cir., 1984); UNITED STATES v. MASTRANGELO, 733 F.2d 793 (11th Cir., 1984);

Twenty-one cases raised both constitutional and statutory speedy trial grounds, but of those only six raised cognizable

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[21] (continued) UNITED STATES v. OTERO-HERNANDEZ, 743 F.2d 857 (11th Cir., 1984); UNITED STATES v. PACKER, 730 F.2d 1151 (8th Cir., 1984); UNITED STATES v. PIROLLI, 742 F.2d 1382 (11th Cir., 1984); UNITED STATES v. POLLOCK, 726 F.2d 1456 (9th Cir., 1984); UNITED STATES v. PRINGLE, 751 F.2d 419 (1st Cir., 1984); UNITED STATES v. PUETT, 735 F.2d 1331 (11th Cir., 1984); UNITED STATES v. RICHMOND, 735 F.2d 208 (6th Cir., 1984); UNITED STATES v. RUBIN, 733 F.2d 837 (11th Cir., 1984); UNITED STATES v. RUGGIERO, 726 F.2d 913 (2nd Cir., 1984); UNITED STATES v. RUSH, 738 F.2d 497 (1st Cir., 1984); UNITED STATES v. RUSSO, 741 F.2d 1264 (11th Cir., 1984); UNITED STATES v. SARRO, 742 F.2d 1286 (11th Cir., 1984); UNITED STATES v. SAVOCA, 739 F.2d 220 (6th Cir., 1984); UNITED STATES v. SCAIFE, 749 F.2d 338 (6th Cir., 1984); UNITED STATES v. SEVERDIJA, 723 F.2d 791 (11th Cir., 1984); UNITED STATES v. SHAID, 730 F.2d 225 (5th Cir., 1984); UNITED STATES v. SMITH, 750 F.2d 1233 (4th Cir., 1984); UNITED STATES v. STEAD, 745 F.2d 1170 (8th Cir., 1984); UNITED STATES v. STOCKWELL, 743 F.2d 123 (2nd Cir., 1984); UNITED STATES v. TEDESCO, 726 F.2d 1216 (7th Cir., 1984); UNITED STATES v. TERTROU, 742 F.2d 538 (9th Cir., 1984); UNITED STATES v. TURNER, 725 F.2d 1154 (8th Cir., 1984); UNITED STATES v. VAN BRANDY, 726 F.2d 548 (9th Cir., 1984); UNITED STATES v. WALBORN, 730 F.2d 192 (5th Cir., 1984); UNTIED STATES v. WHITAKER, 722 F.2d 1533 (11th Cir., 1984); UNITED STATES v. WIEHOFF, 748 F.2d 1158 (7th Cir., 1984); UNITED STATES v. YUNIS, 723 F.2d 795 (11th Cir., 1984); UNITED STATES v. ZIELIE, 734 F.2d 1447 (11th Cir., 1984); UNITED STATES v. CAMPBELL, 706 F.2d 1138 (11th Cir., 1983); UNITED STATES v. CAPARELLA, 716 F.2d 976 (2nd Cir., 1983); UNITED STATES v. DALY, 716 F.2d 1499 (9th Cir., 1983); UNITED STATES v. DUNN, 706 F.2d 153 (5th Cir., 1983); UNITED STATES v. GARRETT, 720 F.2d 705 (1983); UNITED STATES v. HAUSMANN, 711 F.2d 615 (5th Cir., 1983); UNITED STATES v. HOPE, 714 F.2d 1084 (11th Cir., 1983); UNITED STATES v. HOWELL, 719 F.2d 1258 (5th Cir., 1983); UNITED STATES v. JANIK, 723 F.2d 537 (7th Cir., 1983); UNITED STATES v. McCOWN, 711 F.2d 1441 (9th Cir., 1983); UNITED STATES v. MANFREDI, 722 F.2d 519 (9th Cir., 1983); UNITED STATES v. MULHERIN, 710 F.2d 731 (11th Cir., 1983); UNITED STATES v. NOVAK, 715 F.2d 810 (3rd Cir., 1983); UNITED STATES v. PAGAN, 714 F.2d 225 (2nd Cir., 1983); UNITED STATES v. PEREZ-REVELES, 715 F.2d 1348 (9th Cir., 1983); UNITED STATES v. PITEO, 726 F.2d 50 (2nd Cir., 1983); UNITED STATES v. SALDIVAR, 710 F.2d 699 (11th Cir. 1983); UNITED STATES v. SCHMIDT, 711 F.2d 595 (5th Cir., 1983); UNITED STATES v. SHAHRYAR, 719 F.2d 1522 (11th Cir., 1983); UNITED STATES v. SNYDER, 707 F.2d 139 (5th Cir., 1983); UNITED STATES v. WILLIAMS, 711 F.2d 748 (6th Cir., 1983); UNITED STATES v. WILSON, 720 F.2d 608 (9th Cir., 1983); UNITED STATES v. MALDONADO, ___ F. Supp. ___, (No. 83-20008-01), (Jan. 4, 1985); UNITED STATES v. COVA, 580 F.Supp. 588 (1984); UNITED STATES v. FALVO, 598 F.Supp. 873 (1984); UNITED STATES v. GREEN, 582 F.Supp. 265 (1984); UNITED STATES v. JUVENILE, 599 F.Supp 1126 (1984); UNITED STATES v. RAMOS, 588 F.Supp. 1223 (1984); UNITED STATES v. SMITH, 588 F.Supp. 1403 (1984); UNITED STATES v. WOLLSCHLAGER, 588 F.Supp. 1572 (1984); GOVERNMENT OF THE VIRGIN ISLANDS v. FRANCIS, 98 F.R.D. 626 (1983); UNITED STATES v. SMITH, 563 F.Supp. 217 (1983); UNITED STATES v. TEST, 584 F.Supp. 800 (1983); UNITED STATES v. BRADLEY, 566 F.Supp. 1392 (1983) (This one case also raised issued under the Interstate Agreement on Detainers, 18 U.S.C., Appendix (1976).

Sixth Amendment Claims. [22, 23] Only eighteen out of the one-hundred thirty four cases raised purely constitutional speedy trial claims, and of those eleven were either frivolous or near frivolous.[24]

Of the seven reported decisions that raised purely constitutional claims containing plausible arguments, five were based on indictments so old as to predate the sanctions of the Speedy Trial Act.[25] (See: United States v. Horton, 646 F.2d 181 [5th Cir., 1981]; United States v. Litton Systems, Inc., 722 F.2d 264 [5th Cir., 1984]) Two of those five reported opinions were U.S. v. Loud Hawk.

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[22] The six cases that raised non-frivolous constitutional claims were: UNITED STATES v. BOUNOS, 730 F.2d 468 (7th Cir., 1984); UNITED STATES v. CROSBY, 713 F.2d 1066 (5th Cir., 1983); UNITED STATES v. FELTON, 592 F.Supp. 172 (1984); UNITED STATES v. HERNANDEZ, 724 F.2d 904 (11th Cir., 1984); UNITED STATES v. MITCHELL, 723 F.2d 1040 (1st Cir., 1983); UNITED STATES v. SAMPLES, 713 F.2d 298 (7th Cir., 1983).

[23] The other fifteen cases, where claims to which the Sixth Amendment were clearly inapplicable were: UNITED STATE v. MARUSKA, 717 F.2d 1222 (8th Cir., 1983); UNITED STATES v. AMADO, ___ F.2d ___, (No. 84-1784), (1st Cir., 1985); UNITED STATES v. AMBROSE, 707 F.2d 1209 (11th Cir., 1983); UNITED STATES v. AUSTIN, 99 F.R.D. 292 (1983); UNITED STATES v. BROWN, 720 F.2d 1059 (9th Cir., 1983); UNITED STATES v. GARCIA, 741 F.2d 363 (11th Cir., 1984); UNITED STATES v. KIDD, 734 F.2d 409 (9th Cir., 1984); UNITED STATES v. KUBIAK, 704 F.2d 1545 (11th Cir., 1983); UNITED STATES v. MICHEL, 590 F.Supp. 1135 (1984); UNITED STATES v. PAJARI, 715 F.2d 1378 (8th Cir., 1983); UNITED STATES v. RADUE, 707 F.2d 493 (11th Cir., 1983); UNITED STATES v. REME, 738 F.2d 1156 (11th Cir., 1984); UNITED STATES v. ROPER, 716 F.2d 611 (4th Cir., 1983); UNITED STATES v. SANCHEZ, 722 F.2d 1501 (11th Cir., 1984); UNITED STATES v. SNOWDEN, 735 F.2d 1310 (11th Cir., 1984).

[24] TIEMENS v. UNITED STATES, 724 F.2d 928 (11th Cir., 1984); UNITED STATES v. BROWN, 742 F.2d 359 (7th Cir., 1984); UNITED STATES v. GREENE, 737 F.2d 572 (6th Cir., 1984); UNITED STATES v. JORGE-SALON, 734 F.2d 789 (11th Cir., 1984); UNITED STATES v. MARLER, 583 F.Supp. 1456 (1984); UNITED STATES v. McGIFFEN, 578 F.Supp. 899 (1983); UNITED STATES v. MILLS, 704 F.2d 1553 (11th Cir., 1983); UNITED STATES v. NAPPER, 574 F.Supp. 1527 (1983); UNITED STATES v. PULLEN, 721 F.2d 788 (11th Cir., 1983); UNITED STATES v. WALKER, 710 F.2d 1062 (5th Cir., 1983); UNITED STATES v. WILLIAMS, 738 F.2d 172 (7th Cir., 1984).

[25] UNITED STATES v. DELEON, 710 F.2d 1218 (7th Cir., 1983); UNITED STATES v. DENNARD, 722 F.2d 1510 (11th Cir., 1984); UNITED STATES v. LITTON SYSTEMS, INC., 722 F.2d 264 (5th Cir., 1984); UNITED STATES v. LOUD HAWK, 741 F.2d 1184 (9th Cir., 1984); UNITED STATES v. LOUD HAWK, 564 F.Supp. 691 (1983); UNITED STATES v. RICHARDS, 707 F.2d 995 (8th Cir., 1983); UNITED STATES v. SOLOMON, ___ F.2d ___, (No. 84-3069, 84-3070), (9th Cir., 1985)

In the last twenty-two months, seventy-one percent of the claims of denial of speedy trial were based on the Act alone. Eighty-seven percent of the claims raised the Act, while less than ten percent raised non-spurious constitutional claims. Only five percent of the cognizable claims asserted purely constitutional grounds (and two out of those seven claims are this case). If aged cases (to which the Act could not apply) are eliminated from consideration, then less than two-percent of the one-hundred thirty four claimed deprivations of speedy trial were, like that of the Loud Hawk case, based on good faith invocations of the Sixth Amendment.

However, the Loud Hawk case is the only case of those reported since May, 1983 to raise the even rarer issue of Sixth Amendment deprivation during interlocutory appeal. It is therefore unremarkable that the District Court decision has been cited only once, and that by Judge Redden on an immigration case, soley for the purpose of comparison of "Kafkaesque . . . principle[s]." See: Hi-Hat Restaurant, Inc. v. I.N.S., 569 F. Supp. 776 (D.C. Or., 1983).

Although the Ninth Circuit decision has existed for seven months, it also has only been cited once, and not on issues of appellate delay. See: United States v Solomon, ___F.2d___ (Nos. 84-3069. 84-3070) (9th Cir., Feb.22, 1985). We know of no proceeding which has ground to a halt in the appellate courts, waiting for this Court to rule on this case.

The facts show the question of pre-trial appellate delay to be a rare one at best. Rather than the Loud Hawk case's embodying a pressing question of importance that demands this Court's attention, it contains an endangered and mutant issue which, however interesting and bizarre, is sterile.

3. The Questions Presented by Petitioner, and the arguments in support thereof, are entirely without merit.

The Government's proposed questions have as a foundation assumptions that are not only illogical, but are abhorrent to the method of analysis of speedy trial questions dictated by this Court.

The case of Barker v. Wingo, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972) defines the analytic approach this Court has ordered for examining a claim of deprivation of the right to a speedy trial.[26]

Rejecting "inflexible approaches," the Court adopted a "balancing test" which required trial courts to look at the peculiar facts of each case in a standardized framework. "[S]ome of the factors which courts should assess in determining whether a particular defendant has been deprived of his right . . .[include l]ength of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." 407 U.S. at 529-530. The subsequent decision of this Court In Moore v. Arizona, 414 U.S. 25, 94 S.Ct. 188, 38 L.Ed.2d 183 (1973) affirmed the mandate that "courts must engage in a difficult and sensitive balancing process," rather than merely examine each case to see if a particular factor exists. 414 U.S. at 26.

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[26]There were only a few occasions prior to Barker wherein this Court considered a speedy trial claim. From the repeated ad hoc attempts to approach the subject that those cases represented, it became clear that a standardized approach to the area was essential. Barker represents that approach. For development of the law see: Beavers v. Haubert, 198 U.S. 77, 25 S.Ct. 573, 49 L.Ed.2d 950 (1904); Pollard v. United States, 352 U.S. 354, 77 S.Ct. 481, 1 L.Ed.2d 393 (1957); United States v. Ewell, 383 U.S. 119, 86 S.Ct. 773, 15 L.Ed.2d 627 (1966); Klopfer v. North Carolina, 386 U.S. 213, 87 S.Ct. 98, 18 L.Ed.2d 1 (1967); Smith v. Hooey, 393 U.S. 374, 89 S.Ct. 575, 21 L.Ed.2d 607 (1969); Dickey v. Florida, 398 U.S. 30, 90 S.Ct. 1564, 26 L.Ed.2d 26 (1970) and United States v. Marion, 404 U.S. 307, 92 S.Ct. 455, 30 L.Ed.2d 468 (1971).

In balancing the factors, the length of delay is looked at first. "The length of the delay is to some extent a triggering mechanism. Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance." 407 U.S. at 530.

Thereafter the other factors are thrown onto the scales. Depending on the reason for delay asserted, this factor can acquire different weights in the balance. A defendant's demand for a speedy trial is "entitled to strong evidentiary weight." Id., at 531. Prejudice to the person and to the defense is the last factor, although it need not be affirmatively demonstrated to tip the scales in favor of defendant. (See: Moore, supra)[27]

It is clear that the Sixth Amendment is not concerned with every type of delay before trial. It does not protect a person during a period "before a defendant is indicted, arrested or otherwise officially accused." MacDonald, supra, 456 U.S. at 6; see also Marion, supra, 404 U.S. at 313. If charges are dropped and the case returned to investigative status, there is no Sixth Amendment issue. MacDonald, supra.

Thus, the holdings of this Court dictate that when a speedy trial claim is asserted, the trial court must first determine whether the Sixth Amendment applies at all. If it does not, none of the Barker factors need be examined, and the concerns of the Due Process Clause of the Fifth Amendment are considered. If the Sixth Amendment does apply to the delay, then the trial court must determine the length of delay. If the delay is sufficiently long to be presumptively prejudicial, then a full analysis of all factors ensues.

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[27] In fact, the "Sixth Amendment right to a speedy trial is * * * not primarily intended to prevent prejudice to the defense caused by passage of time; that interest is protected primarily by the Due Process Clause and by the statutes of limitations." United States v. MacDonald, supra 456 U.S at 8. The Government, in phrasing the Questions Presented as it does, invites this Court to depart from the standardized approach of Barker and return to the former anarchistic approach to the subject.

Either a defendant is or is not protected by the Sixth Amendment. Either he or she is or is not "officially accused." MacDonald, supra, 456 U.S. at 6. The Government must recognize that Respondents, having spent the last ten years as defendants in on-going proceedings designed to convict and incarcerate them, have been and are "officially accused." Since the Government also knows that the Barker scales balance in Respondents' favor, it tries to skew them.

Since the length of delay is the triggering mechanism under Barker, the Government attempts to improperly defuse that factor, knowing that to artificially recalculate the length of delay is to deprive a defendant of the protection of the Sixth Amendment, just as if he or she had not been "officially accused."

The length of delay is the length of time that a defendant has awaited trial while protected by the Sixth Amendment. Whether that delay was justified, whether the defendant acquiesced in the delay, and whether the defendant was hurt by the delay are factors that help determine if the period of delay has deprived a criminal defendant of Sixth Amendment protection. Barker, supra.

Nowhere is there any authority for the proposition that a court must first determine the reason for the delay (e.g., the Government appeal, defendants' appeal and various subsidiary factual issues) and the prejudice suffered (e.g. considerations of release restrictions, etc.)[28] and then recalculate the length of delay. Under such a strained and illogical approach, would the analysis begin anew, with the length of delay defined as a period less than one where a defendant is "officially accused?" How then would the other factors be "balanced?"

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[28] Respondents do not accept the Government's erroneous characterization of their release status during the Government's appeals as "free of all restrictions on their liberty." See discussion, infra.

The Government's suggested departure from the analytical approach to Sixth Amendment claims established by this Court becomes totally absurd when it contends that the length of delay should be determined by which side is ultimately successful on pre-trial appeals.[29] Petition for Certiorari at 20-21.[30] Such a per se test is not only without support in law

[29]The Government refers to Respondent's motions which were reversed on appeal as "legally erroneous," and suggests that we somehow had the power to "induce the district court to err." Petition for Certiorari at 12. The contention seems to be that the motions for dismissal were not well founded. Although the appellate courts reversed the district court dismissals, none found the claims without merit. If the Government's mischaracterization of Respondents' dismissal claims is to be believed, then the six-plus years taken to "correct" such "erroneous" claims becomes even more suspect.

[30]Cited in "support" of this novel proposition is a dissent by a non-panel member from denial of rehearing en banc in United States v. Brown, 520 F.2d 1106 (D.C. Cir., 1975). That authority is hardly persuasive, as the majority found that Brown was denied his right to a speedy trial, and calculated time consumed on a successful Government appeal as part of the period of delay (14 months). 520 F.2d at 1109.

United States v. Auerbach, 420 F.2d 921 (5th Cir.), reh'g denied, 423 F.2d 676 (1969, cert. denied, 399 U.S. 905 (1970) is a pre-Barker case which, despite its archaic standard, does not support the Government's proposition. That court "considered" (rather than balanced) factors in considering a speedy trial claim. (Auerbach established "bridges" to cross, rather than factors to be weighed. See: Murray v. Wainwright, 450 F.2d 465, 471 [5th Cir., 1971]) It counted the appeal time as part of the length of delay, considered that the delay was not caused by any "arbitrary, capricious, vexatious, oppressive, deliberate or negligent conduct on the part of the Government," and concluded the defendants suffered no serious prejudice from the delay. Having counted the appellate delay, the Court then considered whether the defendants waived their rights to a speedy trial. It considered the repeated applications of the defendants to the courts as an implicit waiver of the speedy trial right. 420 F.2d at 924-925

United States v. Litton Systems, Inc., 722 F.2d 264 (5th Cir., 1984), cert. denied, No. 83-1550 (May 14, 1984) does not support the Government's contention either. In that case the delays while the defendants were charged were counted. The fact that Litton sought delay was its undoing.

The various state cases cited by the Government do not help render its contention any less frivolous. State v. White, 118 Ariz. 47, 574 P.2d 840 (1977) involved questions of "Arizona law only," and reasonably concluded that the state's speedy trial act did not require pre-trial appeals to be disposed of in sixty days. 574 P.2d at 849; State v. Sieckmann, 3 Or. App. 454, 474 P.2d 367 (1970) was a pre-Barker case which did consider the appeal time as delay, but concluded that since "the delay was neither vexatious, capricious, oppressive or prejudicial to defendant, we find no merit in this assignment

or logic, it would overrule Barker's balancing approach, and render every defendant who is a party to a pre-trial appeal unprotected by the Sixth Amendment, regardless of the length of delay, reasons for delay, demand for a speedy trial, or prejudice suffered.[31]

The questions presented by the Government have as their foundation a complete refutation of the balancing test of Barker v. Wingo, supra. There being no need to overrule Barker, this Court should not consider the Government's contentions.

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[30](continued)of error." 474 P.2d at 370. The analysis in that case was grounded in State v. Robinson, 3 Or. App 200, 473 P.2d 152 (1970) which exhibited the antique proposition that no speedy trial claim can succeed unless the cause of delay is "'improper and the defendant suffers actual prejudice. * * * Nor * * * can he complain of delays resulting from such things as court procedures.'" 473 P.2d at 158; People v. Jamerson, 198 Colo. 92, 596 P.2d 764 (1979) clearly counted the delay, but did not weigh the appeal time against either side: "[T]he delay * * *has now stretched to over three years. [T]he reasons for delay * * * mitigate this factor. * * * For more than a year and a half, the case has been tied up in various appeals." 596 P.2d at 768; Scarbrough v. State, 76 Wis. 2d 87, 250 N.W.2d 354 (1977) is the only case that provides the Government's argument with any support. Yet, that case is distinguishable as the defendant refused to proceed to trial, and the delay was only a matter of months. Moreover, that case recognized that "[w]e cannot however, under Barker, fail to give weight to delays in bringing criminal cases to trial caused by inadequate judicial resources and mounting caseloads.

[31]No doubt the Government would like to see such a rule, as it would allow criminal defendants protection of the speedy trial clause only when they did not need it. (If a defendant prevails on a pre-trial appeal, the case is either dismissed, or evidence that the prosecution needs to go forward remains suppressed.)

4. The Court of Appeals (and the District Court before it) correctly decided the Questions fairly presented. There is no conflict among the circuits.

4. Question One: Whether the Sixth Amendment's Speedy Trial Clause protects a defendant who is an appellee in an on-going pre-trial appeal filed by the Government as part of its effort to try, convict and incarcerate him or her.

The Court of Appeals properly found that, during the Government's appeal of the dismissal orders, defendants were protected by the Speedy Trial Clause.

The Court rejected the Government's contention that MacDonald, supra, required holding that whenever charges are dismissed over the Government's objection, the defendant-appellee is no longer "accused." The ammunition for the refutation of the Government's position is in MacDonald itself.

In MacDonald the Government moved to dismiss an indictment pursuant to FRCrP 48(a). Thereafter Dr. MacDonald was a free man, until the result of further investigation was the decision to bring forth a new indictment. Once the Government formally dropped the charges, MacDonald was "in the same position as any other subject of a criminal investigation." MacDonald, supra, 456 U.S. 8-9.

The Court correctly found that the circumstances facing defendants in this case were the antithesis of those that confronted Mr. MacDonald. The Government removed the stigma of formal accusation when it dropped the charges against MacDonald. As the branch of Government that is charged with enforcing the laws, the executive let it be known that it was not presently prepared to prove that MacDonald had violated any laws. The major evil protected against by the speedy trial guarantee--formal accusation--was no longer a concern. (App. 9a)

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Not for one instant in the last decade has the Government relented from its formal accusation of Respondents. As the Court found:

> The public accusation in this case clearly maintained its force while the government prosecuted appeals in order to reinstate charges against the defendants. The appeals unequivocally stated the government's intention to continue the prosecution and asserted its legal grounds for doing so.

(Id., at 9a).

When the Government voluntarily dismissed the charges against MacDonald, it was willing for him to be a free man. When the Government suffered a dismissal in this case in 1976, it requested the District Court to impose bail restrictions.[32] That request came weeks after Respondents were released from custody over the strong objection of the Government, which responded by the highly prejudicial designation of Respondents as "high risk," a designation the Government has never moved to rescind. (CR 63)

After the Rule 48(a) dismissal in MacDonald, he was no longer named as a defendant in on-going litigation designed to bring him to trial on criminal charges. Not so with Respondents. MacDonald did not need counsel to argue before any court that his case was properly dismissed. Not so for Respondents.

Additionally, a recipient of a Rule 48(a) dismissal has his or her criminal charges resolved at least temporarily, and can count on the protection of any applicable statute of limitations to put a time limit on the Government's ability to change its mind and renew charges. Respondents have no such

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[32]Obviously, when the Government obtains a FRCrP 48(a) dismissal, "the prosecution shall thereupon terminate," and thus no release restriction can be imposed. In contrast, 18 U.S.C. §3731 and §3146 not only authorize bail for an appellee of an involuntary dismissal, but also refer to the appellee as a "defendant" and a "person charged with offense."

Likewise, when a 48(a) dismissal occurs, there is no case pending, so the Government cannot issue subpoenas for a non-existent proceeding. In this case, the Government moved both the District and Circuit Courts to keep its trial subpoenas alive pending appeal. (CR-R-274, CR-R-281, CR-R-289)

protection, both because the Government does not have to change its mind about prosecuting them, and because the statute of limitations does not apply to an on-going case.[33, 34]

The Government must go back to the Grand Jury and make a showing of facts pertaining to a defendant's alleged illegal activities in order to renew a case dismissed on its own motion. Here, it need only convince one court that another court made a legal error.[35] If the Government succeeds here, it can get its old indictment back, whereas it must begin anew after a voluntary dismissal.

Once the Government files its notice of appeal from a dismissal with prejudice, the dismissal is, in effect, stayed. Unlike the 48(a) dismissal, it can be reversed---and that reversal and reinstatement is the exact object of the appeal. App. 9a-10a, 126a-130a).

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[33]The Government's position that this case was terminated with the 1976 dismissal order is in contrast to its contention that the electronic surveillance motion has been pending for seven years (during which time the Government was admittedly dilatory). See: RT 3/10/83 at 3.

[34]One of the logical underpinnings of MacDonald is the policy consideration that the Government should not feel that it has to keep charges pending against an individual when it may not think it can prove them. It is better to reduce the anxiety of the citizen by a voluntary dismissal until and unless the Government has its case all put together; and, conversely, having no fear of a running clock, the Government will be less likely to continue prosecuting weak cases, thus clearing up some court congestion and shielding its investigations from the speedy trial clock. See: United States v. Hillegas, 578 F.2d 453, 460 (2nd Cir., 1978); United States v. Lara, 520 F.2d 460, 466 (D.C. Cir., 1975) (Wilkey, concurring); United States v. Lovasco, 431 U.S. 783, 791-792 97 S.Ct. 2044, 52 L.Ed.2d 752 (1977); United States v. Walker, 601 F.2d 1052 (9th Cir., 1979); Casenote: MacDonald, 114 St. Mary's Law Journal 113, 125 (1982).

Such considerations play no part where the Government opposes dismissal, has completed its investigation, and wants the whole world to know that it wants to try and to convict the defendants. The stigma of formal accusation remains, and the charges are still not finally resolved. See Casenote: MacDonald, supra, at 123.

[35]When Judge Belloni dismissed the indictment he stated: "Inasmuch as I have power to do so, this dismissal of the indictment is with prejudice, unless the Ninth Circuit decides otherwise and remands the case or some part of it for trial." (RT 5/12/76, p. 8)

The Ninth Circuit in Loud Hawk gave effect to this Court's holding in MacDonald. The cases cited by the Government do not support its contrary contention.[36] Klopfer v. North Carolina, supra, involved a defendant who--like respondents and unlike the recipient of a 48(a) dismissal--had no protection from a statute of limitations. North Carolina's chief prosecutor was not vigorously and publically pursuing his case against Klopfer, and was certainly refraining from making public statements suggesting that "if [he] had been [part of] a gang of bank robbers, [he] would have been in jail a long time ago." (RT 8/5/80 at 111) Klopfer, like MacDonald, had the freedom to go wherever he wanted without restriction. Respondents, regardless of the ultimate ruling on the dismissal issue, always knew that they could be hauled back into Court and be required to post bail while the case was on appeal.

United States v. Bishton, 463 F. 2d 887 (D.C. Cir., 1972) provides support for the Loud Hawk panel's conclusion. In that case a defendant's motion to dismiss was allowed, and a Government appeal ensued. Nine months later the District Court dismissal was affirmed. Three months thereafter the Government reindicted. The Court referred to the three month interval between affirmance of dismissal and reindictment as "the period between the end of one prosecution and the beginning of another * * * [during which] he 'suffers no restraint on his liberty and is not the subject of public accusation.'" 463 F.2d at 891. The Court therefore held that the first prosecution was not at an end until the Court of Appeals affirmed the District Court's dismissal.

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[36]The Government's reliance on Arnold v. McCarthy, 566 F.2d 1377 (9th Cir., 1978) is totally misplaced. Arnold was not "accused" during a dismissal because the Government moved for the dismissal. The same holds true for United States v. Samples, 713 F.2d 298 (7th Cir., 1983). In neither case were there possibilities of restriction under a dismissed indictment, and in both cases the Government had willingly put itself in a position of having to obtain a new indictment in order to proceed.

It is not surprising, therefore, that this section of Bishton is specifically referred to by the MacDonald Court. 456 U.S at 8, fn.7. After the dismissal was affirmed, there could be no restrictions imposed on Bishton's freedom, and he was no longer formally accused. As if he had been the beneficiary of a Rule 48(a) dismissal, Biston was no longer a party to any proceeding designed to bring him to trial on a criminal charge. However, the prosecution was still active before the affirmance of the dismissal. He was afforded the protection of the Sixth Amendment during the Government's appeal as he stood accused.

Petitioner seems to realize the weakness of its argument. It proposes a factual distinction to claim that these particular Respondents were not accused: the allegation that, while severe restraints could have been placed on defendants, they were not subject to "actual" restrictions. (App. 13-14). Apparently in recognition that the Sixth Amendment protects not only those subject to restraints (which Respondents were), but all those officially accused, it asserts that the "government's appeals exposed respondents to the same 'public obloquy, stress and anxiety' that would have been caused by any public knowledge of the government's interest in or consideration of criminal charges against them." (Id., at 16)

What kind of fiction is it that pretends that a decade long uninterrupted and unrelenting Government effort to incarcerate Respondents causes the same "public obloquy, stress and anxiety" as "any public knowledge of the government's interest in or consideration of criminal charges against them?" And even if the stresses can be compared, at least the statute of limitations would provide a time limit for the stress of a suspect. As the charges against Respondents have a five-year statute of limitations, their stress is only a few months away from entering triple-overtime.

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During this nearly ten-year pre-trial period, Respondents have never been totally free of restrictions. The Government had opposed their release from jail in 1976. When they were released the Government designated them "high risk." When the case was dismissed because the Government refused to give them their trial, bail restrictions were sought, in effect an admission by the Government that the prosecution continued. It now takes a contrary position, as suits its compulsive purpose. The District Court knew that Respondents wanted to go to trial, and would have to keep contact with counsel while the case was on appeal. Respondents behaviour and readiness for trial convinced the Court to deny the Government's request.

However, the fact is that even the Government has characterized the history of this case as "acrimonious" (CR-R-74) (See also: App. 35a). Respondents have always been aware that one false step and they would be dragged back to the District Court arguing against a Government request for bail. This is an advocacy of mindboggling public policy for the Government to insist that the Sixth Amendment only affords protection to those pre-trial appellees who break the law or otherwise give cause for the imposition of tougher release restriction during appeal.[37] Its argument does not square with

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[37]The Government's argument, were it to prevail, would create a most anomalous situtation. District Judges might impose bail restrictions on people they would fully intend to release so that the individual would be protected under the Sixth Amendment in the the event that the Government's appeal of the dismissal order took an inordinate amount of time.

Indeed, if the Government had not contumaciously refused to proceed to trial in 1976 on the gun counts, there would have been no dismissal of the dynamite counts. The proceedings in District Court on those charges would have been stayed, and this case would not have been in a dismissal posture. To find no Sixth Amendment protection under these circumstances would be to reward the Government for creating unnecessary delay.

It would be a most strained reading of Barker to punish defendants who are given a release status concomitant with their strong desire to appear at a trial while rewarding a Government that wrongfully refused to proceed to trial.

the policies of the Bail Reform Act of 1984 in general (18 U.S.C. §3141-3151), or with section 3143, which holds that in situations where the Government has taken an appeal from a dismissal, the defendant is to be treated as any other defendant still awaiting trial.

The Court of Appeals correctly found that Respondents were "subject to the imposition of . . . restraints at any time. Their freedom was far more precarious than that of a person merely subject to investigation but not indicted." (App. 9a)

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family, all his witnesses had died, and the Government's witnesses memories had evaporated[38], he could not complain because the interlocutory appeal time did not "count," and thus Barker is not triggered.

The most obvious problem with this argument is that it elevates the Government's appeal rights to a position superior to that of a constitutional guarantee. As the Court stated in United States v. Wilson, 420 U.S. 332, 337, 95 S.Ct. 1013, 43 L.Ed.2d 232 (1975): "Congress intended to remove all statutory barriers to Governmental appeals and to allow appeals whenever the Constitution would permit." [emphasis added] Rather than recognize that the Courts are a branch of Government that owe a defendant a speedy trial[39], Petitioner seeks to remove the protection of the Sixth Amendment and have criminal defendants assume all the burdens of Governmental delay.

This Court noted in Klopfer, supra at 386 US 223, that the earliest codification of the speedy trial right is from the Assize of Clarendon (1166). That document clearly put the burden of speedy trials on both the executive and judicial branches, and there is no reason to depart from that long-standing acknowledgement.[40]

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[38]Thus rendering the right of confruntation meaningless.

[39]The District Court, in rejecting this same Government argument, noted that "[t]he federal government as a whole--executive, judicial, and legislative--is governed by the strictures of the Speedy Trial Clause. All three branches of government have a duty to insure that rights of criminal defendants to speedy trials are not abrogated. Dickey v. Florida, 398 U.S. 30, 90 S.Ct. 1564, 26 L.Ed.2d 26 (1970) (Brennan, J., concurring)." App at 133a-134a. See also: United States v. Fox, 3 Mon. 512 (1880); Cain v. Smith, 686 F.2d 374 (5th Cir., 1983); People v. Johnson, 162 Cal. Rptr. 431, 606 P.2d 738 (1980) (In Bank); United States v. Blanca Perez, 310 F. Supp 550 (S.D.N.Y., 1970); United States v. Perry, 353 F. Supp 1235 (D.C. Cir., 1973); United States v. Kojima, 3 Haw. 383 (1909); Petition of Provoo, 17 F.R.D. 183 (1955)

[40]"4. And when a robber or murderer or thief or receiver of them has been arrested through the aforesaid oath, if the justices are not about to come speedily enough into the country where they have been taken, let the sheriffs send word to the nearest justice by some well-informed person that they have arrested such men, and the justices shall send back word to the sheriffs informing them where they desire the men to be brought before them; and let the sheriffs bring them before the justices." 386 U.S. 223, fn. 9, citing 2 English Historical Documents 408 (1953).

When the Government suggests that "the 'deliberate pace' of the criminal process is, with good reason, especially unhurried at the appellate stage," (Petition for Certiorari at 17) it ignores the requirement that the Courts provide a defendant a speedy trial.[41] It is, of course, reasonable for review of an issue on appeal to take longer than to decide the same issue in a trial court. However, nowhere does the Government suggest why the Barker balancing test is incapable of weighing this obvious fact.

The mark is widely missed when the Government asserts that "it would make little sense to require the appellate process proceed with the speed required by the Sixth Amendment." Petition for Certiorari at 18. Unlike the Speedy Trial Act, there are no "speed limits" for pre-trial appeal under the Sixth Amendment. The Constitutional provision only prohibits speed so slow that, on balance, the "basic rule" is violated.[42]

The Loud Hawk court recognized that when either the Government or a defendant has a right to a pre-trial appeal,[43] that right should be exercised with the expectation that necessary and reasonable delays will occur. If the appellate courts act as expeditiously as they should, the resulting delay will be justified and not result in a Sixth Amendment violation. On the other hand, when unjustified delay results,

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[41]"[T]he rule we announce today, which comports with constitutional priciples, places the primary burden on the courts and the prosecutors to assure that cases are brought to trial. Barker, supra, 407 U.S. at 529.

[42]As U.S. Attorney Charles Turner has observed, "Every case has to meet both standards. You can never escape the Constitution." THE OREGONIAN, "In Banks Case Wheels of Justice Grinding Slowly," February 1, 1985.

[43]The Government cites Doescher v. Estelle, 454 F. Supp. 943 (N.D. Tex., 1978), United States v. Ewell, 383 U.S. 116, 86 S.Ct. 773, 15 L.Ed.2d 627 (1966); United States v. Bizzard, 674 F.2d 1382, (11th Cir.), cert. denied, 459 U.S. 973 (1982), United States v. Hill, 622 F.2d 900 (5th Cir., 1980), Dandridge v. United States, 265 F.2d 349 (D.C. Cir., 1959), Harrison v. United States, 392 U.S. 219, 88 S.Ct. 2008, 20

it is possible and proper for the Barker balance to find a constitutional deprivation.

One cannot expect a pre-trial defendant to wait forever for an appeal to be concluded without having his or her right to a speedy trial violated. This Court, in Barker, stated that "a justified reason . . . should serve to justify appropriate delay." 407 U.S. at 531 [emphasis added]. If we can concede that, as a matter of law, a twenty-five year delay would be inappropriate for an "expedited" pre-trial appeal, then we must allow a trial court, as in Loud Hawk, to use his or her discretion and determine whether a six year and three month delay was or was not appropriate, based on the record and the reasons set for by the Government to attempt to justify that delay. Indeed, other Courts have done just that, and concluded that appellate review did become unjustifiably long. Atkins v. People of the State of Michigan, 644 F.2d 543 (6th Cir., 1981), cert. denied, 452 U.S. 964; Chism v. Koehler, 392 F. Supp. 659 (W.D. Mich., 1975), aff'd, 527 F.2d 612 (6th Cir., 1976), cert. denied, 425 U.S. 944, 96 S.Ct. 1868, 48 L.Ed.2d 188 (1976). See also: United States v. Bailey, 399 F. Supp. 526 (M.D. Fl., 1975); United States v. Perry, supra.

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[43](continued) L.Ed.2d 1047 (1968) and In re Williams, 393 N.E.2d 353 (Mass., 1979) for the propositions that:

1) There is no Sixth Amendment right to a speedy appeal;

2) Time consumed on defendants' appeals does not count toward the length of delay for purposes of the Speedy Trial Clause; and

3) These cases, when contrasted with Loud Hawk create a "conflict over the proper treatment of time attributable to defendants' appeals. . ." Petition for Certiorari at 18, 24.

All these contentions are completely meritless. All the cases cited are totally distinguishable by the fact that they consider post-trial, post-conviction appeals. In those cases defendants have had their trial, been convicted, and no longer are presumed innocent. If they were restricted in any way or subject to public accusation, it is because they have had their day in court and have had judgement entered. Respondents are presumed innocent, have never been convicted, and have yet to have their trial, speedy or otherwise.

The Government tries to create the impression that there is a split among the Circuits regarding whether pre-trial appellate time should "count." A brief examination of the cases belies that contention.

In United States v. Jackson, 508 F.2d 1001 (7th Cir., 1975) the District Court found a speedy trial violation, but based that conclusion on "the length of delay between indictments and disposition on the merits has been and will be unreasonable." 508 F.2d at 1005 [emphasis added] Thus, the Court found a speedy trial violation based in part on consideration of delay which had yet to occur. Such an analysis would in fact deny the Government its right to appeal, and would be improper.

The court of appeals then considered the speedy trial claim as of the date of dismissal Id., at 1005. This is no more nor less than what the Loud Hawk panel did. App. at 11a, fn. 4. Jackson does not stand for the proposition that any and all delay attendant to a Government appeal is proper; rather, it holds that that delay cannot be prospectively factored into the balance.

United States v. Bishton, supra, is of questioned vitality on this issue as it predates Barker as the Government concedes (Petition for Certiorari at 21, fn. 17). Citing a draft A.B.A. project, the Court stated that time spent on appeals "is not generally included [in its Standards Relating to Speedy Trial] for purposes of calculating the period of delay in prosecution." 463 F.2d at 890. Yet, the Court recognized that "Courts, of course, are not excluded from the obligation to give defendants a speedy trial," and noted that "delay caused by appeals by the Government [can] constitute denial of a defendant's right to speedy trial." Ibid.

It held that "[w]henever the Government's action at any stage of the proceeding indicates bad faith, neglect, or a purpose to secure delay itself or some other procedural advantage, the resulting delay is not justified." Ibid. This holding that an improper Government appeal can result in

unjustifed delay does not extend to its converse--namely, a ruling that a good faith appeal can go on forever without abridging the right to a speedy trial. Further, the recognition that the delay attendant on an improper appeal can impact the Sixth Amendment compels the conclusion that all appellate delay must be counted. Barker looks to the length of delay rather than the reason for delay as a triggering mechanism.[44]

The remaining cases cited by the Government clearly support the proposition that time on appeal is to be counted. The Government's contention otherwise is without support, and thus there is no conflict to be resolved. See United States v. Herman, 576 F.2d 1139, 1145 (5th Cir., 1978) ("Most of the delay . . . resulted from the government's . . appeal.");[45] United States v. Litton Systems, Inc., supra. ("There is nothing speedy about a five year delay [which included time on appeal]"); United States v. Sebastian, 428 F. Supp. 967, 975 (W.D.N.Y.), aff'd, 562 F.2d 211 (2nd Cir., 1977) ("A great bulk

[44]The Government admits that in D.C. Circuit cases decided after Barker appellate delay has been counted. Petition for Certiorari at 21-22, fn. 17, citing Perry, supra, Brown, supra, United States v. Sarvis, 523 F.2d 1177 (D.C. Cir., 1975) and United States v. Rosenbloom, 511 F.2d 777 (D.C. Cir., 1974).

[45]Interestingly, in Herman the Government tried to get the Court to remove from the length of delay consideration the time between Herman's arrest and his withdrawal of a guilty plea. The Court's response is instructive:

> The government urges us to charge the time between arrest and Herman's withdrawal of his guilty plea to Herman. This procedure is mandated for cases arising under the Speedy Trial Act, 18 U.S.C. §3161(i). We are not sure, however, that artificially shortening the length of delay would be appropriate in every case arising under the constitutional guarantee. . . The analysis mandated by Barker v. Wingo allows us to examine the reasons for the delay and to excuse any delay that the defendant himself causes.

576 F.2d at 1145, fn. 4.

of the delay occurred . . . because of the Government's appeal of this court's suppression ruling."); State v. Helenbolt, 334 N.W.2d 400, 405 (Minn., 1983) ("[Under] Barker v. Wingo • • • the state's appeal and concomitant [eight month] delay were justified." [emphasis added]); Atkins v. People of the State of Michigan, 644 F.2d 543, 548 (6th Cir., 1981), cert. denied, 452 U.S. 964 ("The length of time involved here--fifteen months from arrest to decision by the state Court of Appeals on the interlocutory order--unquestionably is sufficient to trigger a speedy trial claim."); Chism v. Koehler, 392 F. Supp. 659 (W.D. Mich., 1975), aff'd, 527 F.2d 612, 663 (6th Cir., 1976), cert. denied, 425 U.S. 944, 96 S.Ct. 1868, 48 L.Ed.2d 188 (1976) ("[R]espondent admits that the twenty-seven month delay between arrest and trial [most of which was on defendant's interlocutory appeal] is sufficient to raise the issue."); Day v. United States, 390 A.2d 957 (D.C., 1978) ("[I]n calculating the length of delay the motions judge erred in excluding 18 1/2 months of interlocutory appeal time from the 32 1/2-month period between arrest and trial.") See also: United States v. Cox, 475 F.2d 837, 841 (9th Cir., 1973) and United States v. Osuna-Sanchez, 446 F.2d 566, 567 (9th Cir., 1971), cert. denied, 404 U.S. 1022, 92 S.Ct. 698, 30 L.Ed.2d 672 (1972).

C. Question Three: Whether every time a suppression order is entered against the Government with respect to only one part of a criminal case, the Government can contumaciously refuse to proceed to trial on the uneffected counts after being denied a stay by both the trial and appellate benches, and suffer no consequence under Barker v. Wingo for such recalcitrance.

As the previous section indicated, appellate time is counted in determining the length of the delay before trial during which a defendant is protected by the Sixth Amendment. To hold otherwise would be to allow a case to take forever before proceeding to trial, and to rule that Courts do not have any obligation to provide a speedy trial.[46] Cf. Barker, supra, 407 U.S. at 529. Appellate delay, if justified, "should serve to justify appropriate delay." Barker, supra, 407 U.S. at 531 [emphasis added].

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[46]In fact, the Government's argument that to count delay on appeal denies its rights under 18 U.S.C. §3731 has an interesting parallel if applied to the trial courts. Problems beyond the Government's control and other unexplained delay can result in denying the Government its right to bring a person charged with violating the law to trial. Certainly the right to appeal is no stronger than the right to try people indicted by the grand jury. Yet, unexplained delay weighs against the Government. See: Barker, supra, 407 US, at 531 (overcrowded dockets); United States v. Brown, 600 F.2d 248, 254 (10th Cir., 1979), cert. denied 444 US 917 (ill judge and overcrowded docket); United States v. Grismore, 564 F.2d 929, 932 (10th Cir., 1977), cert. denied 435 US 954 (difficulty in getting a judge); United States v. Macino, 486 F.2d 750, 753 (7th Cir., 1973) (unjustified delay, assumed to be from negligence or understaffed prosecutor's office); United States v. Jenkins, 701 F.2d 850, 857 (8th Cir., 1983) (overcrowded dockets and difficulty in getting a judge); Strunk v. United States, supra, 412 US 434, 436, 93 S.Ct. 2260, 37 L.Ed.2d 56 (1973) (unintentional delays, overcrowded court dockets, or understaffed prosecutor's office); United States v. Tercero, 640 F.2d 190, 194 (9th Cir., 1980), cert. denied 449 US 1084 (stipulation between defense counsel and prosecutor to set over case pending another criminal prosecution); United States v. Vispi, 545 F.2d 328, 334 (2nd Cir., 1976) (judge's inaction); Atkins v. People of the State of Michigan, supra, at 548 (11 month interlocutory appeal); United States v. Bailey, supra, 399 F. Supp. 526, 530, (M.D.Fl., 1975) (lack of judges); United States v. Bowman, 493 F.2d 594, 597 (2nd Cir., 1974) (2nd Circuit Rules violated--understaffed prosecutor's office); Cain v. Smith, supra, 686 F.2d 374 (5th Cir., 1982) at 382 (unexplained delay; delay resulting from jury's observation of defendant who was shackled or wearing jail garb); United States v. Carini, 562 F.2d 144, 149 (2nd Cir., 1977) (judicial illness, summer recess, unexplained inaction, overloaded docket, judicial disqualification, judicial vacancies); Chism, F. Supp., supra. at 655 ("lamentable" twenty-seven month appeal); Dufield v. Perrin, 470 F. Supp. 687, 690 (D.N.H., 1979) (overcrowded dockets, judicial understaffing); Jones v. Morris, 590 F.2d 684, 686 (7th Cir., 1979) cert. denied 440 US 965 (lack of reason); United States v. Latimer, 511 F.2d 498, 501 (no reason shown, overcrowded dockets); United States v. Sarvis, 523 F.2d 1177,

The Government takes its meritless argument one step further in footnote 16 of its Petition for Certiorari (at p. 19). It incredibly seeks to exclude from the length of delay the time necessary to appeal the dismissal entered because the Government's unnecessary delay in proceeding to trial in 1976.[47]

Judge Belloni had suppressed evidence that was material to only part of the Government's case. The Government had no right to appeal the suppression as to the uneffected counts. Respondents wanted to go to trial. The District Court refused to grant a continuance. The Court of Appeals refused to issue a stay. Every court that has ever had occasion to review this case has held that the Government was responsible for

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[46](continued) 1182 (D.C. Cir., 1975) (appellate delay); United States v. Calloway, 505 F.2d 311, 316 (D.C. Cir., 1974) (delay in filing report of mental examination, "deliberate pace of system."); Hanrahan v. United States, 348 F.2d 363, 368 n. 16 (D.C. Cir., 1965), cert. denied 389 US 845 (ineffective court adminstration); United States v. Lane, 561 F.2d 1075, 1079 (2nd Cir., 1977) (unavailability of replacement for ill judge).

It should further be noted that a series of reasonable delays can accumulate to become one unreasonable delay. Chism, F. Supp. supra, at 667.

[47]The only favorable thing that the Government can say about its violation of the Orders of two Courts in refusing to proceed to trial is that that decision was made "in good faith." Without conceding that point for an instant, one can only view with incredulity the argument that delays not resulting from bad faith actions of the Government are not cognizable under the Sixth Amendment. The citation to United States ex rel. Mitchell v. Fairman, 750 F.2d 806 (7th Cir., 1984) offers no support for this absurd assertion. (Therein the Court, of course, counted the appellate time, but found that it was explained. 750 F.2d at 809.) Nor does the citation to United States v. Sointil, 705 F.2d 415 (11th Cir., 1983), wherein delay was counted and weighed against the Government.

Furthermore, the assertion that the "firearms counts had not been severed from the dynamite counts--[and therefore] the government would have had to go to trial on all counts, thereby losing its right to appeal the suppression order" is patently ridiculous. (Petition for Certiorari p. 19, fn. 16) The suppression order had nothing to do with the gun counts. Those counts were unsevered because the Government was unwilling to have them severed.

unnecessary delay. To exempt such clearly unjustifiable delay from Sixth Amendment scrutiny, as the Government proposes, would create a frightening rule. The Government would be able to contumaciously ignore Court Orders designed to avoid unnecessary delay and unwarranted appellate proceedings, and suffer no consequence under Barker v. Wingo.[48]

This Court need not grant Certiorari in order to reject the Government's frivolous and unsupportable proposition.

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[48]Like an unrepentant lawbreaker the Government feels elated by its thus far successful effort to avoid the consequences of its actions. It irresponsibly refused to obey Orders of two Courts, was found to have created wholly unnecessary delay, had the dismissal of the gun counts sustained, and yet refers to its appeal as "successful."

In fact, one can presume that at least some of the four year delay in the first appeal was associated with examination of the Government's improper refusal to proceed to trial nine years ago. It would not be too farfetched to assert that, with a trial on the firearms counts completed in May 1976 and a simpler appeal, this case would never have reached such an aged state. In fact, had the Government proceeded on the firearms counts in 1976, there would not have been any need to resubmit them to the grand jury, no vindictive-appearing indictment would have been returned in 1980, and the second appeal would not have existed.

D. Question Four: Whether the appellate court erred in upholding the the District Court's use of discretion in sustaining a speedy trial violation by applying the analysis of Barker v. Wingo to the unique facts of this decade old case.

The Court of Appeals did not err in upholding the District Court's conclusion that Respondents' rights to a speedy trial had been violated.

i) LENGTH OF DELAY.

As the discussion of the Questions Presented, supra, demonstrated, the Circuit Court was correct in calculating "the delay in this case as ninety months, the period from the arrest of defendants until their indictment was last dismissed on May 20, 1983." App. at 11a. Clearly this delay was sufficient to "trigger" further inquiry.

ii) REASONS FOR THE DELAY.

Barker, supra, defines how to weigh the reasons for any particular delay in the balance of factors:

> [D]ifferent weights should be assigned to different reasons. A deliberate attempt to delay the trial in order to hamper the defense should be weighed heavily against the government. A more neutral reason such as negligence or overcrowded courts should be weighed less heavily but nevertheless should be considered since the ultimate responsibilty for such circumstances must rest with the government rather than with the defendant. Finally, a valid reason, such as a missing witness, should serve to justify appropriate delay.

407 U.S. at 531. The Circuit Court weighed the reasons for delay as follows:

For the first pre-trial appeal it separated the dynamite and non-dynamite counts. It concluded that the delay attendant on appeal of the latter was "wholly unnecessary" and weighed "heavily" against the Government. As discussed above, there was no other conclusion at which the Court could have arrived.[49]

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[49]Note again that the Government suggests that all appellate time be excluded as it "prevailed on those appeals." Since when does a decision upholding a dismissal because of unwarranted and unnecessary Government delay constitute exoneration?

As to the dynamite counts, the Court properly found that "[t]he Government's action in taking the appeal was therefore clearly justified, and would of itself support a reasonable delay. The problem is that this appeal took forty-six months." App. at 13a. The Court's analysis followed Barker to a tee. It first determined that the reason for the delay was justifiable (a proper Government appeal). It then "related [the] length of delay [to] the reason . . . assign[ed] to justify the delay." It did so knowing that "a valid reason . . should serve to justify appropriate delay." Barker, supra, 407 U.S. at 531.

Although a shorter perioo of time might have been found justifiable for a pre-trial, "expedited" appeal, clearly a nearly four year delay was not "appropriate," or justified. Such delay falls into the "neutral" Barker pigeonhole, and thus weighs against the Government, but less heavily. App. at 13a.

The delay attendant to the second appeal was considered justified by the Court of Appeals. It further found that six months of delay were the fault of Respondents, and thus balanced the reason for the delay against a period of twenty-three instead of against twenty-nine months. As it considered a twenty-three month period for a pre-trial interlocutory appeal to be not "undue," it found that the reason for the delay justified the length of delay, and therefore did not weigh this factor in the balance.[50] App. at 15a.

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[50]Although Respondents find no fault with the analytical approach of the Circuit Court to the delay of the second pre-trial appeal, we do have serious problems with its conclusions.

In reviewing the District Court's opinion, the Circuit Court should have employed a standard of "clearly erroneous" to any pure or mixed findings of fact (United States v. Hart, 546 F.2d 798, 801-802 (9th Cir., 1976). Further, as each speedy trial case is ad hoc and requires the District judge to exercise discretion, it should have employed an "abuse of discretion" standard. (United States v. Mills, 641 F.2d 785, 787 (9th Cir., 1981), cert. denied, 454 U.S. 902, 102 S.Ct. 409; United States v. Simmons, 536 F.2d 827, 832 (9th Cir., 1976), cert. denied, 429 U.S. 824) Instead it substituted its own judgement.

The Government criticizes the Court, suggesting without any authority, that "the time spent on respondents' own unsuccessful interlocutory appeal must, on any reasonable analysis, weigh heavily against them." Petition for Certiorari at 25. At the time defendants filed their appeal, they not only had a right to appeal, but made an excellent claim under the then existing case law. App. 32a fn. 4. Cf. United States v. Hollywood Motor Car Co., 458 U.S. 263, 102 S. Ct. 3081, 73 L.Ed.2d 754 (1982), United States v. Goodwin, 102 S. Ct. 2485 (1982). Just as the Government's right to appeal deserves protection by affording it an appropriate amount of time to be asserted, a defendant's rights are entitled to protection too.

Either side to a law suit must be permitted to make a good faith assertion of its rights (whether it ultimately prevails or not). A certain amount of delay must be expected and tolerated by the litigants when one side or the other properly exercises any of its rights which necessarily delay the proceedings. It is when that expected and tolerable quantum of delay becomes unjustified and inappropriate that it acquires weight under the "reason for delay" factor.[51]

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[50](continued) Respondents obviously believe that the District Court was correct in concluding that the period of delay was twenty-nine months, and that the reason for the delay (proper pre-trial appellate procedures employed by each side) did not serve to justify that length of delay, especially as this appeal was also "expedited." Judge Redden properly weighed that twenty month period against the Government as a "neutral" reason. App. at 131a-132a.

However, Respondents' disagreement with the Circuit Court here is inconsequential, as the great weight of the Government's improper appeal, combined with the totally unjustifiable length of the first pre-trial proceeding, compelled the Court to the correct result. It found that the "reason for delay" factor, even absent the weighing of what Respondents believe was further unjustified delay, "contribute[s] . . . to our conclusion that defendants' speedy trial rights have been violated in this case."

[51]Before the first appeal began nearly nine years ago, the Government asserted that an appropriate delay for an "expedited" pre-trial appellate proceeding would be one of a "matter of months." (Cr-140)

iii) ASSERTION OF THE RIGHT.

More than by anything else, the antique nature of this law suit is revealed by the blatant lie put forth by the Government that Respondents did not want a speedy trial. This case is so old that a revisionist history is already being written.

To "support" this incredible claim, the Government faults defendants for asking for a few short trial court continuances. Petition for Certiorari at pps. 26-27. As indicated above, the continuances were sought either to allow all defendants to be tried together, or to allow time for defense investigative efforts, stymied by the Government's outrageous instruction to witnesses to refrain from talking with the defense.

The Government further suggests, Petition for Certiorari at pps. 26-27, that vigorous defense representation in an attempt to secure relief for gross governmental misconduct and other transgressions of defendants' statutory and constitutional rights is inconsistent with an assertion of a right to a speedy trial. Where is there authority or reason to suggest that in order to demand a speedy trial well founded motions and petitions should not be filed? What is the inconsistency between wanting a dismissal of the charges (or suppression of evidence)[52] when there are grounds for such relief, and a speedy trial too? The only reason for such hysterical and unreasonable arguments from the Government is its recognition of both the powerful weight given to a speedy trial demand in the Barker balance, and the strength with which Respondents have asserted that demand.

The Government's citations to Barker and Litton are directly on point. Both cases affirmatively demonstrated the great weight the Barker scales provide to a defendant's desire

[52]The Government asserts that the decision of Respondents Dennis Banks, Loud Hawk, and Redner to seek Certiorari from the second appeal reflects a desire to avoid trial. Rather, it evidenced a desire to avoid severance of defendants and relinquishment of claims under authority of this Court's decisions against piecemeal litigation.

to have a speedy trial. Barker waited five years for his trial, but his right to a speedy trial was not abridged because he did not want one. 407 U.S. at 534-536. Litton "sought delay . . . from the inception of this litigation," and thus could not complain about a five year delay. 722 F.2d at 271. Knowing that all other factors weigh against it, (App. at 18a) the Government is engaging in a desperate attempt to save its case with an unmitigated fiction.

Fortunately, this crass attempt to blame the victim cannot succeed, as the defendants' desire to have a speedy trial and the prosecution's dilatory tactics are well documented. No court has ever charged defendants with seeking delay; every court that has ever had the opportunity to rule on the Government's irresponsible refusal to proceed to trial (despite denial of a request for stay by both trial and appellate benches) has laid reponsibility for unnecessary delay at the U.S. Attorney's doorstep. Even Judge Wallace in dissent agreed with the majority and with Judge Redden that Respondents wanted a speedy trial. (App. 24a)

Three of the four Respondents were incarcerated from November, 1975 until February, 1976. Their demands for release, bitterly opposed by the Government, were alternative means of asserting a speedy trial demand. Cain v. Smith, 686 F.2d 374, 384 (5th Cir., 1982); United States v. Calloway, 505 F.2d 311, 316 (D.C. Cir., 1974). Once out of custody (as "high risk" designees) defendants were busy organizing their defense in anticipation of trial. (See attachments to CR 138) Less than three weeks before the trial date they petitioned the Court to hold the trial "in a facility sufficiently large to accomodate a reasonable number of members of the general public" as this case had attracted national attention and Indian people were coming to attend from all over the country. CR 132. As far as the defendants were concerned, the Government's case against them was riddled with misconduct and racism, and the Government knew that defendants were eager to put those charges before a jury. It truly seems like a

lifetime ago, but a present-day elementary school principal named Russ Redner, in seeking release before trial, stated:

> I'd like to say that we intend to stay here. We do intend to stay here and deal with this matter; we have intended to do so from the day -- from the very beginning. We have very little voice in America. Our people make up less than one percent of the total population. So therefore, we have to utilize every opportunity to speak for our people. We face prison as a consequence, but we are still willing and bound by ancestor's blood to carry on and to see this matter through to the end. We're not going to run away from ourselves. We're going to stay and see who is indeed on trial here.
>
> I want to get out on the street. I want my counsel to prove my case that I'm innocent and that the guilt lies with the Government.

RT 12/29/75 pps. 44-45; RT 1/23/76 pps. 51-52.

When the Government requested delay, Respondents opposed it. When the appellate bench was considering the request for a stay, a vigorous objection was filed (Respondents' Appendix at 1a). Nine years after the fact the Government asserts that Respondents did not want a speedy trial, yet only eight days before the May 12, 1976 trial date the Government admitted that "the defendants [and] their counsel . . . desire the case to be tried at the earliest practicable opportunity." CR 136 (FCR 810). On the date set for trial Judge Belloni found that the defendants were ready. RT 5/12/76. After every remand defendants reasserted their claim. (App. 135a)

Clearly, there was no error by either District or Circuit Court giving Respondents' demands for a speedy trial "strong evidentiary weight." Ibid., quoting Barker, supra, 407 U.S. at 531-532.

iv) PREJUDICE.

There are two types of prejudice that are relevant to a speedy trial question: "prejudice to the person and prejudice to the defense." Dufield v. Perrin, 470 F.Supp. 687, 691 (D.N.H., 1979).

Regarding the former, Respondents, all "high risk" designees, have had these unresolved charges hanging above their respective heads like a sword of Damocles for nearly a

decade. The District and Circuit courts both found that Respondents have suffered personal prejudice from the outrageous length of delay. (App. 16a, 136a). As Judge Redden observed: "The Supreme Court has consistently noted the substantial nature of this type of prejudice. MacDonald, supra, 456 U.S. at 8-9, 102 S.Ct at 1502; Barker, supra, 407 U.S. at 533, 92 S.Ct. at 2193; United States v. Marion, 404 U.S. 307, 320, 92 S.Ct. 455, 30 L.Ed.2d 468 (1971)."[53] (App. 136a)

Although a showing of prejudice to the defense is not an essential element of a successful Sixth Amendment claim,[54] Respondents have made such a showing. Based on its knowledge of the record of this case and the affidavits submitted on behalf of Respondents, (CR-R-241, CR-R-242, CR-R-246, CR-R-247) Judge Redden found that material defense witnesses had died, and other material witnesses had lost all recollection of the

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[53] See also: Dickey, supra, 398 U.S. at 54 (J. Brennan, concurring); Dillingham v. United States, 423 U.S. 64, 65, 96 S.Ct. 303, 46 L.Ed.2d 205 (1975); United States v. Haulman, 288 F. Supp. 755, 780 (E.D. Mich., 1968); Klopfer, supra, 386 U.S. at 221-222; Macino, supra, 486 F.2d at 753; Speedy Trial, 20 Stanford Law Review 476 (1968); Note: Speedy Criminal Trial, 27 Stanford Law Review 525, 533 (1975); Blanca Perez, supra, 310 F. Supp. at 552-553; Hoskins v. Wainwright, 485 F.2d 1186, 1188-1189 fn. 3; (5th Cir., 1973); United States v. Zabady, 546 F. Supp. 35, 40 (M.D. Pa., 1982). In fact, this is the type of prejudice that a court can take judicial notice of. United States v. Bailey, 399 F. Supp. 526, 531 (M.D. Fl., 1975)

[54] See Moore v. Arizona, supra, 414 U.S. at 26; MacDonald, supra, 456 U.S. at 8. U.S. 25, 94 S.Ct. 188, 38 L.Ed.2d 183 (1973).

events of November, 1975.[55, 56] The Government had ample opportunity in the District Court to contest Respondents' showing of "obvious" prejudice to the defense. If it truly believed that Respondents were caught "red-handed" (sic!) and could therefore suffer no prejudice, it had every opportunity to present its theory to the District Court; it chose not to do. The bold, self-serving, and unsupported assertions made before this Court are hardly persuasive. This case is almost a decade old--twice the statute of limitations. Prejudice to the defense, which need not be affirmatively demonstrated (but was) can even be presumed. See United States v. Vispi, 545 F.2d 328, 334 fn. 7 (2nd Cir., 1976). See also People v. Johnson, 162 Cal. Rptr. 431, 606 P.2d 738, 749 (1980) (In Bank) and Hodges v. United States, 408 F.2d 543, 550 (8th Cir., 1969).

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[55]These witnesses were ones whose identities were hidden by the Government. Respondents learned of their existence by obtaining police reports from other lawyers on other cases. The reports indicated that these two people had seen the vehicles described by the FBI teletype on November 14, 1975 and been shown "throw downs" days after Respondents' arrest. Both had opportunities to see occupants of the vehicles. None of the Respondents was identified, although two other people were, according to the reports of the officers. These witnesses no longer have any recollection. (App 137a)

[56]A sampling of the other prejudice in the record that the Courts did not mention in their opinion includes: 1) Respondents have been prejudiced by a change in public attitudes. See: CR-R-214; United States v. New Buffalo, 600 F.2d 368, 379 (2nd Cir., 1979); 2) Tape records of calls by material witnesses have been destroyed. See: CR-R-242, Dickey, supra, 398 U.S. at 32, Murray, supra, 450 F.2d at 472; 3) KaMook Banks, who successfully completed probation on an unrelated charge can no longer have the possibility of concurrent sentences if convicted. Dufield, supra, 470 F. Supp. at 691; United States v. Graham, 538 F.2d 261, 265 (9th Cir., 1976); Prince v. State of Alabama, 506 F.2d 693, 707 (5th Cir., 1975) See also United States v. Salzmann, 417 F. Supp. 1139, 1144, 1164, 1168, 1169 (E.D.N.Y., 1976); Smith v. Hooey, supra, 393 U.S. at 378; 4) KaMook Banks and Kenneth Loud Hawk would have been eligible for Youthful Offender treatment and no longer are. United States v. Black, 416 F. Supp. 59, 62 (M.D. Fl., 1976); Salzmann, supra, 417 F. Supp at 1173.
In fact, when a defendant's claim "has prima facie merit, the

Government must make a showing which 'convincingly outweighs' a defendant's assertion of prejudice." Parks v. United States, 451 A.2d 591, 602 (1982).[57, 58]

THE BALANCE

Since each of the Barker factors weighed in support of Respondents' speedy trial assertion, the Circuit Court was correct in sustaining Judge Redden's ORDER finding a Sixth Amendment deprivation.

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[57] See also Day, supra, 390 A. 2d at 970, 1978); United States v. Avalos, 541 F.2d 1100, 1116 (5th Cir., 1976), cert. denied, 430 U.S. 970; United States v. Barket, 530 F.2d 189, 196 (8th Cir., 1976); Dickey, supra, 398 U.S. at 54-55 (J. Brennan, concurring); United States v. Quinn, 540 F.2d 357, 361 (8th Cir., 1976); Blanca Perez, supra, 310 F. Supp at 551; Carini, supra, 562 F.2d at 151; Chism, supra, 392 F. Supp. at 667; Murray, supra, 450 F.2d at 471; New Buffalo, supra, 600 F.2d at 377; Prince, supra, 506 F.2d at 707.

[58]It should be noted that if the indictment in this case is reinstated for whatever reason, Respondents can demonstrate additional prejudice from delay since 1983, and would provide evidence of said prejudice to the District Court in support of a new Motion to Dismiss for Pre-Trial Delay.

5. Should the Court want to consider a case that raises issues of pre-trial appellate delay, Loud Hawk is an inappropriate selection.

This case involves an exceptionally long period of delay, Government creation of unnecessary delay, unexplained delay, inappropriate delay, Government appeals, defense appeals (based on jurisdictional holdings vacated while on appeal), three District Court dismissals, one en banc appellate decision, two panel decisions (one reported and one unreported), Governmental misconduct, and political overtones. Indeed, a case with a more muddied record could not be found. It would provide poor material from which to weave any principle which was not capable of spontaneous unraveling.

6. There exists an independant ground upon which the District Court dismissed the indictment which was not addressed by the appellate court or by the Questions Presented by the Government's Petition for Certiorari.

As the Government noted at page 27, footnote 21 of its Petition for Certiorari, Judge Redden also found a due process violation from the delay. As noted above, the Government did not contest Respondent's factual assertions of prejudice before the District Court. It admits that prejudice exists, ignores the fact that its improper refusal to proceed to trial in 1976 gave birth to all subsequent delay, and suggests without any authority that it would be "appropriate for this Court to rule that there was no due process violation." Id., at 28.

The Government is correct in asserting that Judge Redden's due process dismissal must be considered before the case can be returned yet again to the District Court, and indulging in fantasy by suggesting that the voluminous record of this legal dinosaur does not contain evidence of sufficient prejudice to support Judge Redden's ruling.

It would be absurd for this Court to take upon itself the task of combing through the voluminous record of this case, without the guidance of any prior appellate review, to determine what is, in essence, an issue of fact rather than law.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

KENNETH SAUL STERN
Rose & Stern
Suite 101, Kellogg Building
1935 S.E. Washington
Milwaukie, Oregon 97222
(503) 654-7792

Counsel for Respondent
DENNIS JAMES BANKS
(on behalf of all Respondents)

The assistance of Kathryn Johnston, Esq., Michael E. Rose, Esq., Lisa Martens, Katie Wolk-Stanley, and Virginia Raymond in the production of this BRIEF IN OPPOSITION is greatly appreciated.

EDITOR'S NOTE

PAGES 1a-20a WERE POOR HARD COPY AT THE TIME OF FILMLNG. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA)
)
Appellant,)
)
vs.) No. 76-1906
)
KENNETH MOSES LOUD HAWK,ET AL.) DEFENDANTS' OPPOSITION TO THE GOVERNMENT'S REQUEST FOR A STAY
)
Appelles.)

Defendants respectfully urge this Court to deny the Government's request for a stay of the proceedings in the instant case for the below -stated reasons:

1) The Honorable Robert C. Belloni, Chief Judge of the District Court of Oregon, who has lived with this case since November, 1975 and is familiar with the government's conduct therein, and is therefore, in the best position to evaluate the validity of the government's stance in this matter, has forcefully rejected the government's request for a stay of the proceedings.

2) The affidavit of Sidney Lezak, United States Attorney for the District of Oregon certifies that said appeal"was not taken for the purpose of delay." Yet, in open court on April 26, 1976, Mr. Lezak admitted to Judge Belloni that the government will not be ready to go to trial on May 12, 1976 as earlier agreed, and Mr. Lezak made said statement in the face of Judge Belloni's admonition that such a posture would result in the dismissal of this case.

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3)The government is highly unlikely to succeed in its appeal of the District Court's Order Suppressing Evidence, insp of its contentions to the contrary, given the presumption of validity that must be accorded such suppression order, and give the weakness of the authority upon which the government intends to rely in support of its position. (See attached Memorandum of Points and Authorities.)

4) The Defendants would be highly prejudiced by any stay of the proceedings in that such stay would generally abridge their Sixth Amendment right to a speedy trial, and would cause specific hardship for the following reasons:

a) Defendants have labored under the enormous prejudice of being designated by the Government as high-risk individuals pursuant to 18 U.S.C. 3164, a designation which does violence to the presumption of innocence. Furthermore, such designation applied to them by the Government placed an enormous financial and emotional burden upon all the Defendants and their counsel requiring the preparation of a defense in a highly complex case within ninety days. Defendants have successfully met said burden, including completion of all motions on an extraordinarily tight briefing schedule caused by the government's designation of high risk, and Defendants stand ready for trial on a date mutually agreed upon two months ago by Judge Belloni, defense counsel and counsel for the Government.

b) To comply with the U.S. Attorney's Designation of High Risk, all counsel, including two out-of-state counsel,

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with numerous trial commitments, were forced to re-arrange their schedules, to the inconvenience of several state courts.

c) Pursuant to an order of the Honorable Frank Theis, U.S. District Judge in Kansas, the trial of Ka-Mook Banks, one of the co-defendants in the instant matter, has been trailed pending completion of this case. Bail in that matter was set at $20,000 cash, which bail was posted with considerable hardship to the Defendant, and a stay of the instant case would unnecessarily tie up those bail funds which the Defendant needs to support herself and her two infant children.

d) Finally, Defendant Dennis Banks faces extradition proceedings in both Oregon and in California, on a demand for his return to South Dakota. Defendant Banks has strenuously resisted extradition to that jurisdiction because of direct threats against his life by the highest law enforcement officials of South Dakota. It has been made clear to counsel for Defendant Banks, that both Governors will weigh the final outcome of the instant matter heavily in their deliberations of a case which presents such serious issues. To further delay the trial in which Defendant Banks will be exonerated jeopardizes a favorable resolution of these important state matters.

Therefore, Defendants, for all the above and foregoing reasons, respectfully urge this Court to deny the Government's Request for a Stay.

DATED: April 26, 1976

DENNIS ROBERTS
On Behalf of All of the Defendants

1058

STATE OF CALIFORNIA
COUNTY OF ALAMEDA

AFFIDAVIT OF DENNIS ROBERTS

DENNIS ROBERTS, after being duly sworn, deposes and says:

That I am the attorney of record for Defendant DENNIS JAMES BANKS, one of the co-defendants in the instant matter, and that I am licensed to practice before the California Supreme Court and this Honorable Court.

That the co-defendants in this case filed formal discovery motions in this matter several months ago. The Assistant United States Attorney with prime responsibility for this matter several days ago advised one of counsel for a co-defendant that all discoverable material in the case had been turned over to the defendants, that no further discoverable material existed and reaffirmed the committment of the Office of the United States Attorney that as said material became available it would be turned over to the defendants and their counsel immediately.

On April 14, 1976 your affiant had a meeting with said Assistant United States Attorney who turned over discovery material and made the same representations.

On April 22, 1976 your affiant received a packet of materials from defense counsel in a federal criminal matter presently under prosecution in South Dakota involving the death of two F.B.I. agents in Oglala, South Dakota. One of the defendants in that case, LEONARD PELTIER, is a co-defendant in the instant matter. Said packet contained some of the discovery turned over to defense counsel in the Oglala case

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by the United States Attorney in that case. Among the items discovery provided therein were items extraordinarily exculpatory of the instant defendants, including, inter alia, the identification of fingerprints of persons other than the instant defendants whose prints were found in the vehicles containing the alleged contraband which is the subject of the instant prosecution, and evidence that handwritten material found in said vehicles could not be favorably compared with handwriting exemplars provided by the defendants from whom exemplars were obtained.

Suppression of the fingerprint evidence, in light of the fact that Defendant DENNIS JAMES BANKS was not present when the vehicles were seized and that the Government's entire case against him is built on the hypothetical that since his prints were found in the vehicle he must have been the person who drove said vehicle a few hundred feet away from the scene, mandates a dismissal for gross governmental misconduct.

The evidence of fingerprints of persons other than defendants being found in said vehicles was transmitted by the F.B.I. Latent Fingerprint Section to Special Agent in Charge (SAC) Portland on January 21, 22 and 26, 1976. The exculpatory handwriting material was transmitted from F.B.I., Washington, D.C. to SAC, Portland on March 12 and 15, 1976. None of this material was ever turned over to the defendants by the Government herein. Said information is presently being prepared in motion form to be presented to Judge Belloni forthwith.

Sworn to and subscribed before me
this 26th day of April, 1976.

Linda S. Willis
NOTARY PUBLIC

DENNIS ROBERTS

OFFICIAL SEAL
LINDA S. WILLIS
NOTARY PUBLIC - CALIFORNIA
PRINCIPAL OFFICE IN
ALAMEDA COUNTY
My Commission Expires May 12, 1979

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MEMORANDUM OF POINTS AND AUTHORITIES

The Government, according to its Notice of Appeal, intends to rely on three cases, one from the 7th Circuit, U.S. v. Shafer, 445 F2d 379 (7th Cir. 1971) and two from this Circuit, United States v. Trenary, 473 F2d 680 (9th Cir. 1973) and United States v. Sewar 468 F2d 236 (9th Cir. 1972), all of which cases predate this Court's opinion in United States v. Heiden, 508 F2d 898 (9th Cir. 1974), upon which the District Court relied in its Order Suppressing Evidence of March 30, 1976.

All of the above-mentioned cases can be easily distinguished from the case at bar, which involves not only the destruction of all the explosive evidence without retention of even a sample of such evidence (See Order Suppressing Evidence p.6), but also, the totally unjustified destruction of the cardboard boxes and plastic bags within which the explosives were contained, and prior to any attempt, according to the Government, to obtain fingerprints therefrom, although fingerprints were obtained from virtually every surface of the vehicle and its contents in which said explosives were allegedly found. "The destruction of these articles eliminated the possibility that [the Defendants] could have presented evidence rebutting this charge: i.e. they might have been able to show that their fingerprints were not on the dynamite containers." (See Order Suppressing Evidence, hereinafter referred to as Order, p. 4). Furthermore, the destruction of these containers, completely eliminated the possibility that the Defendants could have adduced whose fingerprints might have

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been on said containers. (See affidavit of Dennis Roberts).

United States v. Trenary, supra, is totally inapposite because there the destruction of the evidence was done by foreign officials in Mexico, and not by U.S. government officials. Here, the FBI participated actively in said destruction.

In United States v. Sewar, supra, the inadvertent loss of evidence by a technician who had no reason to realize that the evidence should be preserved for trial, stands in sharp contrast to the findings of the District Court herein. "The officers and agents who were present at and who conducted the destruction of the dynamite and its containers were experienced personnel. They must have known how sensitive this case would become and how material this evidence was to the case." (See Order, pp. 4 & 5).

In United States v. Shafer, supra, the government was not on notice by the 7th Circuit, as was the government in the 9th Circuit, that they are "flirting with danger of reversal any time evidence is lost or inadvertently destroyed." (United States v. Heiden, supra at 903, fn.1). Furthermore, in Shafer, a case not involving the question of constructive possession or the possibility of culpability by persons other than the Defendant, the Court found no concrete prejudice to the defendant who had been given samples of the residue of the destroyed evidence as well as derivative evidence obtained therefrom. "Here, none was saved. Even the wrappers were scraped clean." (See Order, p.6).

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Finally, as regards the unnecessary and totally unexplained destruction of the containers prior to any attempt to obtain fingerprint evidence therefrom and to any "opportunity for defense analysis", Defendants urge that this is a case, not of inadvertent destruction, but rather of intentional non-preservation of highly relevant evidence. "On a spectrum between good faith but inadvertent loss and bad faith destruction ... [the Government's] conduct must lie somewhere in the middle. Perhaps it should lie somewhat closer to the latter end." United States v. Bryant, 439 F2d 642, 647 (1971).

Therefore, for all of the above and foregoing reasons, Defendants urge that the authorities upon which the Government intends to rely and distinguishable on their facts and on the applicable law, and cannot support the certification by the United States Attorney herein, that based upon such authority, the Government's chances of succeeding are great.

DATED: April 26, 1976

Respectfully submitted,

DENNIS ROBERTS
On Behalf of All Defendants

1093

By RECEIVED
MAR 04 1985
ROSE & STERN
Attorneys At Law

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT COURT

FILED
FEB 28 1985
PHILLIP B. WINBERRY
CLERK, U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

APPELLANT,

NO. 83-3067

KENNETH MOSES LOUD HAWK, RUSS JAMES REDNER, DENNIS JAMES BANKS, and DARLENE PEARL NICHOLS, A/K/A KaMOOK BANKS,

APPELLEES.

ORDER

BEFORE: WALLACE AND CANBY, CIRCUIT JUDGES AND CRAIG*, DISTRICT JUDGE

The motion of the United States to recall and stay the mandate is DENIED.

*The Honorable Walter Early Craig, Senior United States District Judge for the District of Arizona, sitting by designation.

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellant,	)	No. 83-3067
	)	
vs.	)	[No. CR 75-296-RE, USDC Or.
	)	
KENNETH MOSES LOUD HAWK, RUSS JAMES REDNER, DENNIS JAMES BANKS, KaMOOK BANKS,	)	DEFENDANTS-APPELLEES OPPOSITION TO GOVERNMENT'S MOTIONS TO STAY AND TO RECALL MANDATE
	)	
Defendants-Appellees.	)	

Defendant-Appellee DENNIS JAMES BANKS, by and through his counsel, Kenneth S. Stern of Rose & Stern, on behalf of himself and all other defendants-appellees most vigorously urges this Court to deny the Government's Motions to Stay and to Recall the Mandate issued in this case on January 16, 1985 and received by the District Court on January 18, 1985.

SUMMARY OF ARGUMENT

Since the mandate has issued, affirming Judge Redden's ORDER dismissing the indictment with prejudice, the Government's Motions to Stay Mandate and Recall Mandate are moot. Furthermore, under the circumstances of this case, this Court no longer has jurisdiction to grant the Government's requested relief.

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FACTUAL BACKGROUND

After this Court issued its opinion in late August of 1984, the Government filed its Petition for Reconsideration. That Petition was denied on January 8, 1985. Federal Rule of Appellate Procedure 41(b) requires a Motion for a Stay of Mandate Pending Application for Certiorari to be filed or the mandate shall issue within 7 days after the petition for rehearing is denied. FRAP 41(a). As no such motion was filed. The mandate issued on January 16, 1985 and was received by the District Court on January 18, 1985.[1] Defense counsel informed their clients that the receipt of the mandate put Judge Redden's ORDER dismissing the case into effect. They were informed that for the first time in ten years the Government was no longer actively trying to prosecute them. They were told that the case was dead.

Eight days after the burden of these charges was finally lifted from the defendants' lives, defense counsel received a MOTION to STAY MANDATE--and three days later a MOTION to RECALL MANDATE. Apparently the Government has not yet finally decided to let this case enjoy its quiet and well deserved death. However, the Government can point to no

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1 The ORDER denying reconsideration is appended hereto as Exhibit "A", the first page of the mandate as Exhibit "B,", the MOTION TO STAY MANDATE as Exhibit "C," and the MOTION TO RECALL MANDATE as Exhibit "D." It should also be noted that defense counsel have not received service of any petition for certiorari to this date, and have no knowledge of any such petition having been filed.

Rules of Appellate Procedure that provide this Court with the powers of resurrection.

ARGUMENT

MOOTNESS

The MOTION TO STAY MANDATE is clearly moot as it was filed after the mandate has been properly issued pursuant to FRAP 41.

LACK OF JURISDICTION

The "appellate process is terminated . . . when an appellate court issues its mandate of affirmance." United States v. Cook, 705 F.2d 351 (9th Cir., 1963).

Once a mandate issues jurisdiction is terminated. However, jursidiction may be reasserted by recalling the mandate in some circumstances. This case does not represent one of those few circumstances.

Only where the mandate was erroneously issued, or where it must be changed in order to effectuate the judgement may it be recalled. Litigation is "settled" once a mandate issues, and it should be recalled "sparingly" and then only under "exceptional circumstances" where "good cause" is shown Dilley v. Alexander, 627 F.2d 407, 410 (D.C. Cir., 1980). See: Wright, 16 Federal Practice and Procedure Sec 3938 (pps 276-290) and 5B C.J.S. Sec. 1995-1996 (pps. 648-652).

The Government does not allege any "good cause"[2] in its motion, and for good reason. This Court did not err in issuing its mandate, nor does the mandate need to be "corrected" in any fashion. Defendants know of no case that suggests that the Court has jurisdiction to recall the mandate in order to undo the effect of the Government's unexcused and unexplained failure to file a timely motion to stay mandate. Indeed, obvious policy considerations militate against granting the Government's requested relief, even if this Court did have jurisdiction.

Additionally, even if a Court can reassert jurisdiction by recalling a mandate in some circumstances, it is unclear whether it can do so once a criminal action has been dismissed. The issuance of a mandate puts "the appellate decision into effect." Wald v. Regan, 706 F.2d 794, 803 (1st Cir., 1983). The appellate court decision in the instant case was not one that merely returned jurisdiction to the District Court to proceed further. The mandate affirmed Judge Redden's ORDER dismissing this case with prejudice, and put said order into effect. In essence, it was the entrance of a "final judgement." See: United States v. Tulare Lake Canal Co., 677 F.2d 713, 715 (9th Cir., 1982). This case was DISMISSED WITH PREJUDICE since January 16, 1985. It remains dismissed. In this circumstance, this Court has no

[2] In fact, the Government suggests no reason at all why the mandate should be recalled.

jurisdiction to breathe life into it again---and any attempt to do so would profoundly impact defendant's constitutional rights, including, but not limited to, their rights to due process of the laws and to be free from cruel and unusual punishments.

CONCLUSION

Once the mandate of this Court issues affirming a lower court, the "appellate process is terminated." Catmitsch v. Ricsley, 705 F.2d 351 (9th Cir., 1983). On January 19, 1985[3] for the first time in ten years, the defendants were advised that the word "dismissed" actually meant that the Government was both disinclined to continue prosecuting them, and barred from changing its mind. They were told that the "appellate process is terminated," Judge Redden's ORDER dismissing the case with prejudice had actually gone into effect. They were told that the Government could no longer appeal that ORDER. They were told that the issuance of the mandate meant that the case was over, finally.

For whatever reason, the Government chose not to file a Motion to Stay Mandate. The mandate issued, and has taken effect.

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[3] The day counsel received a copy of the mandate.

"History repeats itself---first as tragedy, then as farce." In 1976 the Government delayed unnecessarily, but was allegedly not sufficiently "forewarned" of the consequences of that delay. Rule 41 is its own forewarning. No timely motion to stay, as required by the rule, was filed. The mandate issued. This case is dismissed with prejudice, pursuant to the judgement of the Ninth Circuit. It may be pursued by the Government no further.

For all the foregoing reasons, counsel plead with this Court to deny the Government's motions.

Finally, it should be noted that counsel would be hard pressed to explain to their clients how the ressurrection of this case once the final death certificate has been filed by this Court does not support their perception of the "forked tongue syndrome."

Respectfully submitted,

ROSE & STERN,

by Kenneth S. Stern
ROSE and STERN
Suite 101 Kellogg Building
1935 SE Washington St.
Milwaukie, Oregon 97222
(503) 654-7792

Of Attorneys for Defendants-Appellees

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT COURT

FILED

JAN 8 1985

PHILLIP B. WINBERRY
CLERK, U.S. COURT OF APPEALS

UNITED STATE OF AMERCIA,

APPELLANT,

NO. 83-3067

O R

KENNETH MOSES LOUD HAWK, RUSS JAMES REDNER, DENNIS JAMES BANKS, and DARLENE PEARL NICHOLS, A/K/A KaMOOK BANKS,

APPELLEES.

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By _____
JAN 10 1985
ROSE & STERN
Attorneys At Law

BEFORE: WALLACE AND CANBY, CIRCUIT JUDGES AND CRAIG*, DISTRICT JUDGE

A majority of the panel as constituted above has voted to deny the petition for rehearing and suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote on it.

The petition for rehearing is hereby denied and the suggestion for rehearing en banc is rejected.

*The Honorable Walter Early Craig, Senior United States District Judge for the District of Arizona, sitting by designation.

EXHIBIT "A"

JUDGMENT

FILED

JAN 18 8 29 AM '85

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

vs.

KENNETH MOSES LOUD HAWK, RUSS JAMES REDNER, DENNIS JAMES BANKS, and DARLENE PEARL NICHOLS, aka KaMOOK BANKS,

Defendants-Appellees.

No. 83-3067

DC CV 75-296 JAR

RECEIVED
By _____
JAN 19 1985
ROSE & STERN
Attorneys At Law

APPEAL from the United States District Court for the PORTLAND District of OREGON

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the PORTLAND District of OREGON

and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

A TRUE COPY JAN 16 1985
ATTEST
PHILLIP B. WINBERRY
Clerk of Court
by: _____
Deputy Clerk

Filed and entered August 30, 1984

EXHIBIT "B"

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellant, v. KENNETH MOSES LOUD HAWK, RUSS JAMES REDNER, DENNIS JAMES BANKS, and DARLENE PEARL NICHOLS, also known as KaMook Banks, Defendants-Appellees.	NO. 83-3067 [No. CR 75-296-RE, USDC Oregon] MOTION TO STAY MANDATE

The United States of America by Charles H. Turner, United States Attorney for the District of Oregon, moves the Court for an order staying the issuance of the mandate in the above case pending resolution of the Government's petition for certiorari.

RECEIVED
By _____
JAN 29 1985
ROSE & STERN
Attorneys At Law

Dated this 24th day of January, 1985.

Respectfully submitted,

Charles H. Turner

CHARLES H. TURNER
United States Attorney
District of Oregon

312 United States Courthouse
620 S.W. Main Street
Portland, OR 97205

(503) 221-2766
FTS: 423-2766

EXHIBIT "C"

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellant, v. KENNETH MOSES LOUD HAWK, RUSS JAMES REDNER, DENNIS JAMES BANKS, and DARLENE PEARL NICHOLS, also known as KaMook Banks, Defendants-Appellees.	NO. 83-3067 [No. CR 75-296-RE, USDC Oregon] MOTION TO RECALL MANDATE

RECEIVED
By _____
JAN 30 1985
ROSE & STERN
Attorneys At Law

The United States of America by Charles H. Turner, United States Attorney for the District of Oregon, moves the Court for an order recalling the mandate in the above case pending resolution of the Government's petition for certiorari.

Dated this 29th day of January, 1985.

Respectfully submitted,

Charles H. Turner

CHARLES H. TURNER
United States Attorney
District of Oregon

312 United States Courthouse
620 S.W. Main Street
Portland, OR 97205

(503) 221-2766
FTS: 423-2766

EXHIBIT "D"

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing DEFENDANTS' OPPOSITION TO MOTIONS TO STAY AND RECALL MANDATE on Charles Turner, attorney of record for Plaintiff-Appellant by mailing to said attorney a correct copy thereof, certified by me as such, contained in a sealed envelope, with postage paid, addressed to said attorney at said attorney's regular office address, to wit:

Charles Turner
312 United States Courthouse
620 SW Main Street
Portland, Oregon 97205

and deposited in the post office at Milwaukie, Oregon on this day. Between the said post office and the above address to which said copy was mailed, there is a regular communication by U.S. Mail.

DATED: January 31, 1985

Kenneth S. Stern
Of Attorneys for Defendants-Appellees

1-CERTIFICATE OF SERVICE